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March 20, 1990

By Hand

Hon. Gregory T. Evans, Q.C.
Commissioner
Commission on Conflict of Interest
101 Bloor St. West, 4th Floor
Toronto, Ontario

Dear Greg,

Re: Compensation for Donald Marshall Jr.

Under cover of this letter I am enclosing material that I hope will be of assistance to you in determining the level of compensation to be awarded to Donald Marshall Jr. by the Government of Nova Scotia.

(1) From the Home Office, London

This is a letter, with enclosures, from the Branch that handles compensation for wrongful conviction in England and Wales. Until very recently this was an ex gratia scheme under the prerogative powers of the Crown. This has become a statutory scheme under the provisions of the Criminal Justice Act, 1988, s. 133. According to the Legal Adviser to the Secretary of State, Mr. A.H. Hammond, the English legislation (which I am assuming does not extend to Scotland) is based on the United Nations Covenant relating to Civil and Political Rights, Article 14(6).

I have already acknowledged and thanked the Home Office officials for their prompt cooperation. Copies of my letters are enclosed for your information.

(2) From the Centre of Criminology, University of Toronto

There is a substantial package of material resulting from the library search by Cathy Matthews, Head Librarian, and Jane Gladstone, Reference Librarian, at the Centre of Criminology. The covering letter from the Head Librarian dated yesterday, March 19th, and the accompanying summary of the contents of the binder, describe how the research material has been arranged. Needless to say I have not had an opportunity to do more than get a feel for the dimensions of the subject but I trust that this exercise will prove to be useful to you.

Cathy Matthews has emphasised her indebtedness to Archie Kaiser at Dalhousie Law School with good reason. Let me know if there is anything else I can do to help.

With kindest personal regards,

Sincerely,

A handwritten signature in cursive script, appearing to read "John".

J.L.J. Edwards
Professor Emeritus

/dw

March 8, 1990

A. H. Hammond, Esq.
Legal Adviser
Home Office
Queen's Gate
LONDON, SW1H 9AT

Just a short note to thank you sincerely for responding so readily to my telephone inquiry regarding the scheme for compensating persons wrongfully convicted in England and Wales.

I have now received from Mr. K. MacKenzie, C3 Division, the kind of helpful material that I was looking for and which I shall transmit to the Hon. Gregory T. Evans, the Commissioner who has the task of determining the level of compensation to be paid to Donald Marshall Jr. by the Government of Nova Scotia.

Because of the extraordinary circumstances revealed in the handling of the Marshall case you may be interested in the Report of the Royal Commission which has recently been published by the Government Printer in Nova Scotia. The main part of the report, with the Commissioners' findings and recommendations, is contained in Volume 1. Its relevance to the Guildford bombing Tribunal of Inquiry will readily become apparent as the circumstances of the two cases are compared. I shall follow the English inquiry with great interest.

Thanks again for your help,

With my best wishes,

Yours sincerely,



John Ll.J. Edwards
Professor Emeritus

/dw

March 8, 1990

Mr. K. MacKenzie
C3 Division
Home Office
Queen Anne's Gate
London SW1H 9AT
United Kingdom

Dear Mr. Mackenzie,

I write to thank you for your letter of 8th March 1990 and the enclosures which I have read with interest.

The papers you brought together for me explain the current system in England and Wales clearly and, I hope, fully enough for the purposes of the Commissioner appointed by the Government of Nova Scotia to perform, in the Donald Marshall case, a similar task to that performed by your independent assessors.

With best wishes,

Sincerely,

Σ.

/dw

J.Ll.J. Edwards
Professor Emeritus

I also attach a copy of three different types of case where compensation has been paid, following the advice of the assessor. Each case has to be dealt with on its merits, because of the widely varied circumstances; and there is no tariff as such.

I hope you will find these attachments useful. If we can be of any further assistance, please do not hesitate to let me know.

Yours sincerely



K MacKenzie
C3 Division



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Professor John Edwards
Faculty of Law
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Your reference

Our reference

Date
6 March 1990

Dear Professor Edwards

I understand from Bob Baxter that you would like some guidance on how compensation for wrongful conviction is assessed in England and Wales.

The assessment itself is determined by an independent person experienced in the assessment of damages. The Home Secretary will always accept such advice and accordingly will offer the recommended sum in settlement of the claim.

Compensation falls to be assessed under two headings - pecuniary loss and non-pecuniary loss. Pecuniary loss will cover any loss of earnings brought about by the period of detention in custody,

COMPENSATION FOR MISCARRIAGES OF JUSTICE

NOTE FOR SUCCESSFUL APPLICANTS

Procedure for assessing the amount of the payment

A decision to pay compensation in accordance with the provisions of Section 133 of the Criminal Justice Act 1988, or to make an ex gratia payment from public funds in accordance with the arrangements otherwise set out in the Home Secretary's statement of 29 November 1985 (except for the arrangements relating to Article 14.6 of the International Covenant on Civil and Political Rights which S.133 supersedes) does not imply any admission on the part of the Secretary of State of legal liability. Such decisions are not based on considerations of liability, for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a miscarriage of justice or a wrongful charge, and notwithstanding that the circumstances may give no grounds for a claim for civil damages.

2. The amount of the payment to be made is decided on the advice of an independent assessor experienced in the assessment of damages. An interim payment may be made before the final amount is determined.

3. The independent assessment is made on the basis of written submissions setting out the relevant facts. When the claimant or his solicitor is first informed that a payment will be offered in due course, he is invited to submit any information or representations which he would like the assessor to take into account in advising on the amount to be paid. Meanwhile, a draft

4.2 Non-pecuniary loss

Damage to character or reputation;
hardship, including mental suffering,
injury to feelings, and inconvenience.

5. When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation. In submitting his observations a solicitor should state, as well as any other expenses incurred by the claimant, what his own costs are, to enable them to be included in the assessment.

6. In considering the circumstances leading to the wrongful conviction or charge the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed to by the claimant's own conduct. The amount offered will accordingly take account of this factor, but will not include any element analogous to exemplary or punitive damages.

7. The Home Secretary will regard himself as bound by the independent assessor's recommendation on the amount of compensation, or ex gratia payment. The claimant is not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so.

EX-GRATIA PAYMENT TO MR A

Circumstances leading to the conviction

On 17 March 1985 Mrs B. reported to the police that the previous evening she had been assaulted by Mr A. (resulting in the blackening of both eyes) after she had allowed him into her home. She alleged that later the same evening he had returned to her flat, and again (with her consent).

8. In the interests of a successful claimant, the Home Office will not normally make any public or other statement about the amount of an award in a particular case. Nor will any individual claimant be identified by name. The Home Office will advise enquirers, for example from the press, to contact the claimant, his solicitors or other agent. The Home Office should be advised whether or not the claimant wishes this practice to be followed. Government Ministers have responsibility for accounting for public expenditure and the Home Secretary must therefore be ready to answer any such specific queries by Members of Parliament. However, it is not normal practice to reveal the names of individuals receiving payments of compensation. Nevertheless, the Home Office cannot undertake to prevent press queries or reports.

Home Office

7. The medical evidence offered confirmed that Mrs B suffered from arthritis. Confirmation of facial injuries to Mrs B was also provided. Doubt was expressed as to whether intercourse had taken place on a regular basis as claimed by Mr A.

8. The jury returned a unanimous verdict of guilty upon the count of assault occasioning actual bodily harm. By a majority of 10 to 2 they also found Mr A guilty of rape. The judge remanded Mr A in custody for the provision of medical reports.

Sentence

9. On 18 October 1985 Mr A again appeared before the Court when medical evidence was presented. After consideration, the judge expressed the view that he would not be justified in passing any sentence other than imprisonment. For the offence of assault occasioning actual bodily harm Mr A was sentenced to two years' imprisonment. For that of rape he received five years' imprisonment concurrent. Mr A lodged no appeal.

Subsequent developments

10. On 4 January 1986 Mrs B reported to the police that over the Christmas period she had been raped by D. She claimed that she first met him in October 1985 when he followed her home forced his way into the flat and raped her. At this time two police officers called on another matter and D got dressed. She made no report of the incident. On 21 December 1985 Mrs B claimed that D returned and gained admission to the flat. He forced her upstairs where she became unconscious. Later D committed a number of indecent attacks upon her including rape, until he left on 22 December 1985.

11. D was arrested and appeared before the Court in January 1987 on three counts of rape and one of attempted rape. Mrs B again gave detailed evidence of the alleged assaults upon her. During the course of the proceedings the prosecution agreed to enter a number of admissions about other allegations made by Mrs B. These included allegations of attempted murder by her husband; that her husband was the "Ripper"; that she was being poisoned by carbon monoxide; that she had been struck by lightning; and that she was a member of the WRVS (when she was not). Additionally the prosecution accepted that Mrs B had made continued allegations of different assaults dating back to an alleged rape in 1979; that in 1984 she was referred to a psychiatrist; and that in 1986 it was suggested that she suffered from a paranoid illness.

12. The jury returned a verdict of not guilty on all charges and D was released.

13. Following this trial the Judge expressed concern to the Home Secretary about the safety of Mr A's convictions. After enquiries into the matter, the Home Secretary referred the case to the court of Appeal on 21 September 1987 (section 17 of the Criminal Appeal Act 1968).

Appeal

14. The case was considered by the Court of Appeal on 8 December 1987. A copy of the judgement is attached (Annex A). On the basis of the developments in the D. case and the various admissions made by the prosecution during the proceedings, the court ruled that they had no hesitation in reaching the conclusion that both convictions of Mr A. should be set aside on the grounds that they were unsafe. The convictions were therefore quashed.

Time spent in custody

15. Mr A. was detained by the police on 19 March 1985 and remanded into custody the following day. The Court of Appeal quashed the conviction on 8 December 1987. This period of time - 2 years 9 months - is the subject of the claim for compensation.

Previous history

16. At the time of his arrest Mr A. was 49 years of age. The transcript of the trial shows that Mr A. came to the UK in 1957 and was employed for many years as a bus driver until he had an accident and received injuries which rendered him unfit for work. He has been unable to work since 1972 apart from some temporary jobs such as loading and unloading lorries, mopping floors etc. At the time of the offence he was separated from his family.

17. No claim against loss of earnings has been advanced on Mr A's behalf.

Previous convictions

18. Mr A. has been convicted on four previous occasions for minor offences, the last occurring in 1983. All resulted in either a small fine or a conditional discharge and are spent under the Rehabilitation of Offenders Act 1974. Prior to this conviction of rape and actual bodily harm, Mr A. had never been detained in prison.

Interim awards

19. There has been no interim payment.

Submission by solicitors

20. The solicitors in their letter of 24 May (Annex B) indicate that Mr A. requires no specific compensation against pecuniary or non-pecuniary loss, except with regard to the period of imprisonment.

Legal costs

21. The solicitors asked for their costs of £230, inclusive of VAT, to be met.

MEMORANDUM FOR INDEPENDENT ASSESSOR
PAYMENT OF COMPENSATION TO MR S
CIRCUMSTANCES LEADING TO THE CONVICTION

1. On or about 2 February 1982 police enquiries commenced into allegations of serious corruption of British Rail employees involving the disposal of redundant scrap metal, and the contracts awarded to companies involved in such matters. Two areas were at the centre of the investigation, one of which was
2. Arising from enquiries made by the British Transport Police, Mr S, who at the time was a self-employed contractor involved in the collection and subsequent disposal of scrap metal from British Rail, was arrested on 14 July 1982 along with two others. He was released the same day.
3. Subsequently two files were submitted to the Director of Public Prosecutions for consideration of offences of corruption surrounding 16 British Rail employees and 6 civilians. Having considered the files, the Director of Public Prosecutions authorised proceedings against 4 British Rail employees and 5 civilians for various offences.
4. Mr S, along with a Mr F (his business manager), a Mr Sh

Home Office Reference: _____

Mr A

ASSESSMENT

The compensation which I am required to assess is in respect of the Claimant's imprisonment for about 2½ years. There is no claim for pecuniary loss.

In addition to the period of imprisonment, I take account of the fact that the period of 5 years imprisonment which the Claimant faced was substantial, thereby adding to his distress, and also that it was not until December 1987 that the convictions were quashed by the Court of Appeal, so that the Claimant suffered the stigma of the

admissible evidence had been submitted on which the case could proceed to be considered by the jury. Counsel on behalf of Mr W. advanced a similar line of argument. In response Crown Counsel accepted that the original charges of conspiracy between the four accused and others was, in the light of developments, now only a conspiracy between Mr S. and Mr W. In giving his ruling, the Judge stated that the charge of conspiracy to obtain pecuniary advantage could not be proceeded with, but that of conspiracy to obtain an exemption of abatement of liability should be placed before the jury with amendments to confine the alleged conspiracy to that between Mr S. and Mr W. The other two defendants - Mr F. and Mr Sh. - were then acquitted.

8. The defence offered no evidence in respect of either Mr Simpson or Mr W. The jury were unable to agree a unanimous verdict and, after receiving a majority direction, found the case proved against both men by a majority of 10 to 2. Of the six charges of theft against Mr S., the court record shows the jury to have returned two verdicts of 'not guilty' by direction. In respect of the remaining four counts, the jury were discharged from reaching a verdict and the matters ordered to lie upon file.

9. On 25 February 1986 Mr S. was sentenced to 9 months' imprisonment. Mr W. was sentenced to 6 months' imprisonment suspended for one year.

Appeal

10. On 17 March 1986 Mr S. applied for leave to appeal against conviction on the grounds of errors made by the Judge in the conduct of the trial by refusing to accede to the defence case of there being no case to answer, and also errors in his subsequent rulings and directions to the jury. The following day - 18 March 1986 - an application for leave to appeal against conviction was submitted by Mr W. citing similar grounds. Leave to appeal was granted to both men on 12 May 1986. In the case of Mr S., an application for bail was refused.

11. Mr S. appeared before Crown Court on 9 June 1986 charged with seven counts of corruption. These offences arose out of the same enquiry conducted by the British Transport Police, although the matters concerned related to the area. Mr S. entered a plea of guilty to four of the seven counts and was sentenced to 9 months' imprisonment, six months of which was ordered to be suspended for a year.

12. Following this decision, on 19 June 1986, Mr S. abandoned his appeal against the February conviction. The withdrawal led to Counsel for Mr W. requesting a delay on his client's appeal, in order that the matter could be reconsidered.

13. The appeal by Mr W. was finally heard by the Court of Appeal on 13 October 1986. The judgement (Annex A) records the Court accepting that many of the documents used at the trial had been inadmissible. The Court indicated that the case had been one which bristled with such uncertainties as to make it somewhat tenuous and that the judge had made some unfortunate remarks. They also found the judge had failed to give proper directions on how to treat certain of

the documentary evidence. On those grounds the Court allowed the appeal by Mr W. and quashed his conviction. The Court said that their decision would result in Mr S's conviction having to be quashed. They directed he be advised to submit an appropriate application. Solicitors on behalf of Mr S. made their application on 21 October 1986 and the conviction was quashed on 23 February 1987.

Application for Compensation

14. An application for compensation was made to the Home Secretary on 17 September 1987. After enquiries into the matter the Home Secretary decided on 22 April 1988 that the circumstances of the case were such as to justify him authorising a payment of compensation.

Time Spent in Custody

15. Mr S. was sentenced to imprisonment on 25 February 1986 and released on 27 August 1986. However, on 9 June 1986, he was sentenced to imprisonment for further offences. In respect solely of the February conviction therefore, Mr S. was detained for 104 days. The remaining 80 days were accounted for by both sentences.

Previous History

16. At the time of his appearance for trial in 1986 Mr S. was aged 62 (date of birth 14 July 1923). He had been a self-employed contractor whose main business was with British Rail, but the company went into liquidation around 1983. Further information will be offered, when dealing with matters raised as items for which compensation should be assessed.

Loss of Earnings

17. In their letter of 14 July 1988 (Annex B) solicitors claim loss of earnings for the period 1981-1988. This is on the basis that British Rail contracts were "withdrawn from Mr S. because of the police investigation (not because of the conviction) and consequently his business went into liquidation".

18. Accounts have been forwarded in support of the claim (Annex B). This shows that for the period 1978/79-1981/82 inclusive, drawings by Mr S. were £12,803, £17,160, £19,377 and £17,389 respectively. In the same period net profits for the company were £10,435, £18,934, £17,980, - £5,864 (ie net loss). In Annex C, solicitors offer comments on the way contracts between British Rail and Mr S. operated in particular the "cost plus" contract. According to them, this was a continuing contract but one dependent upon British Rail providing the materials for Mr S. to make use of. British Rail would have given Mr S. the contract apparently because of his tender for hourly rates would have been competitive and satisfactory. The contracts continued until March 1983 when they were stopped as a result of the court case, although before then it became clear that British Rail were denying him access to further materials. The loss of this source of revenue caused the company to go into liquidation. A request was made for accounts in respect of the year ending March 1983 but apparently none were produced because, according to the solicitors, it "seems to be accepted practice in the [accountancy] profession not to proceed to prepare accounts when a client has been arrested". No documentary

evidence is available dealing with the withdrawal of contracts by British Rail. However the solicitors say that after 14 July 1982 (the date of Mr S's arrest) it was clear he was not being invited to tender for the disposal of scrap materials.

19. From enquiries made it would appear that the sale of redundant assets by British Rail is governed by strict procedural rules laid down by the British Railways Board. The system was that as and when any service was required by an outside firm, a contract would be issued for tender. In the case of scrap metal, yearly contracts should have been awarded to the most suitable firm with tenders and bids being made in February/March each year. It would appear that Mr S had been able to secure three different contracts covering the Newcastle area for the removal and sale of scrap metal and was always successful in maintaining them, to the extent that they were amended to three year contracts.

20. Following the obtaining of evidence to show senior railway employees had been involved in corruption, and arising from their admissions, the tendering procedures of British Rail were tightened which no doubt caused British Rail to take the action they did over the awarding of contracts.

21. Mr S's company relied heavily on work from British Rail to keep it solvent. There was of course no obligation on British Rail to continue with these contracts, as they were on an annual basis only and therefore subject to termination. The loss of business to Mr S was not due to his conviction in 1986, but allegedly associated with enquiries made in 1982 into large scale corruption within British Rail and evidence then obtained. Furthermore enquiries into those matters which led Mr S to enter a plea of guilty in June 1986 to four charges of corruption, would in themselves have had an adverse effect on the business. In these circumstances, no claim for loss of earnings arising out of the circumstances of the conviction in February 1986 of Mr S can be met, other than with regard to the period spent in custody.

Arrest of Mr S

22. The solicitors enter a claim for compensation in respect of Mr S being detained by the police "incommunicado" on 14 July 1982 ie the day of his arrest. On this date fell Mr S's birthday.

23. Enquiries of the police have established that Mr S was arrested at 10.40am on 14 July 1982 and released at 7.30pm. During that period he was not held incommunicado; being offered all the conditions of section 62 of the Criminal Law Act 1977, upon arrival at the office of the British Transport Police. At 2pm the same day Mr S was taken to his home address, which was searched. Prior to entry by the police, Mr S was allowed to talk privately with his wife. This is a matter which should, if proved, be the subject of separate representations to the police. Ex gratia payment here is in recognition of the quashed conviction and its effects; there is no indication or evidence that Mr S was wrongly or unlawfully arrested, nor of any default by the police.

Family Relationship

24. Solicitors seek compensation for the breakdown in the marriage between Mr S. and his wife, due to his change in character brought about by the pressures placed upon him during the police investigation, the threat of prosecution and the threat of conviction. After his release Mr S. moved away to an address at where he apparently remained for some 18 months before returning home. There is no evidence offered in support of these assertions.

Medical Effects of the Conviction and Sentence

25. Compensation is sought for the worry and upset caused by the police investigation, the effort and time put into preparing for the defence and duress of the trial. In addition a claim is presented in respect of Mr S.'s deterioration in health caused by the conviction and sentence. Upon request a medical report from Mr S.'s doctor has been provided (Annex D). This shows Mr S. suffered from depression and an anxiety state in 1979. In August 1981 and February 1983 he showed further symptoms of an anxiety state which necessitated treatment with tranquillisers. He continued to take the treatment on an 'as necessary' basis until September 1987, when a recurrence of his anxiety related chest pain arose for which tranquillisers were prescribed.

Effects on Social Life

26. Compensation is sought for the "stigma" of having served a prison sentence. Until his appearance for trial in February 1986, Mr S. had no previous convictions. The resultant conviction therefore led to the first occasion he had been committed to prison.

27. Reference is made by the solicitors to the subsequent conviction of Mr S. in that he pleaded guilty to four counts of corruption a) because his health could not suffer a further trial similar to the previous one and b) the Judge gave an indication that if he pleaded guilty he would not receive any additional time in prison. There is no evidence to support these assertions.

28. The proceedings in June 1986, although arising out of the same enquiry, dealt with matters surrounding British Rail operations in the area (the February 1986 convictions related to the area) and involved corruption at very senior levels within British Rail. While the solicitors suggest that had the first convictions not occurred Mr S. would have fought the subsequent charges and may have probably been acquitted, at these latter hearings British Rail officials admitted corruption charges in the form of gifts from Mr S.

General Matters

29. Solicitors seek compensation to offset the fact that because Mr S.'s business went into liquidation he was adjudged bankrupt for an approximate sum of £70,000 and that because of his age, this debt will continue. They suggest that if police enquiries had been conducted in a more "sensitive fashion" the debt would not have arisen. The conduct of a police investigation however is not a matter for which compensation by the Home Secretary may be considered.

Out of Pocket Expenses

30. Expenses under this heading are limited to costs incurred by Mr S. travelling to and from his solicitor's office. The solicitors report that Mr S. wishes to make no claim for these (Annex E).

Interim Awards

31. There has been no interim award.

Legal Costs

32. The solicitors ask for their costs of £200 plus VAT (ie £230) to be met (Annex E). This Annex also contains comments on the memorandum.

e

Wrongful Conviction and Imprisonment:
Towards an End to the Compensatory Obstacle Course

H. ARCHIBALD KAISER

Associate Professor,
Dalhousie Law School,
Halifax, Nova Scotia.

Wrongful Conviction and Imprisonment:
Towards an End to the Compensatory Obstacle Course

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of justice. There are others whose liberty has been interfered with by agents of the state but who are ultimately either not charged or who are found not guilty of an offence including:

- (a) persons detained for questioning and released without being charged;
- (b) persons detained after being arrested and before their first appearance before a court, who are eventually found not guilty;
- (c) persons detained in custody following judicial refusal of release before trial, who are found not guilty;
- (e) persons whose convictions are set aside and who are released through the regular appeal process.

Many of the arguments which follow could be used to argue for payment of compensation in each of the above categories and indeed some countries presently provide for such measures.⁵ Conversely, it is not intended to suggest here that there should be no limits placed on state liability. However, given the present lack of Canadian scholarship in the field, discussion has been mainly confined to compensation for the most egregious examples of wrongful conviction and imprisonment.⁶ It is hoped that some stimulation will be provided for exploring the prospects of compensating the broader group of persons noted above. Even if their predicaments are less compelling from a compensatory perspective, they have suffered some of the same stigma and burdens. Those whose wrongful conviction and imprisonment are discovered by extraordinary means are merely further along the continuum toward outrage, as the absence of solid foundations for the finding of guilt are only belatedly discovered.

How many people fall into this unfortunate category? It is extremely difficult to provide a reliable assessment of the magnitude of the problem in Canada. A recent study completed in the United States estimated that one-half of 1% to 1% of convictions for serious crimes could be erroneous and that "the frequency of error may well be much higher in cases involving less serious

felonies and misdemeanors".⁷ Using a much narrower category than was employed in the American research, a British study estimates that there are at least 15 cases a year of wrongful imprisonment in the United Kingdom after trial by jury.⁸ There are insufficient data available in Canada to determine if similar rates or gross numbers obtain. However, it is manifestly clear that some innocent people are convicted. Even if one were only dealing with the most horrendous cases where the citizen is imprisoned, the lack of adequate measures to deal with compensation would be bad enough. Considering that the potential numbers of judicial errors could be as high as noted in the foregoing studies and in light of the arguments below, the inadequacies of the Canadian approach become disturbing indeed.

Given the present dearth of writing on wrongful conviction and compensation, the paper will serve to introduce many of the major issues. It first discusses the basic rationale for compensation and explains Canada's international obligations, noting some of the contrary arguments. Next a sketch of the main potential conventional remedies is provided. Finally recent Canadian discussions and initiatives in the field will be reviewed against the background of the relevant article of the International Covenant on Civil and Political Rights to which Canada is a signatory. From the perspective of how policy is formulated, it is most significant that at their meeting of November 22-23, 1984 in St. John's, Newfoundland, the Federal-Provincial Ministers Responsible for Criminal Justice established a Task Force to examine the question of compensation for persons who are wrongfully convicted and imprisoned. The Task Force Report was completed in September, 1985 and is available from the office of the Minister of Justice.⁹ It would appear to have been influential when the same group of Ministers adopted the Federal-Provincial Guidelines on Compensation for Wrongfully Convicted and Imprisoned Persons on March 17-18, 1988 (attached as

sympathetically observed in the Thomas case:

His state of mind in hearing announced a verdict he knew to be wrong must have been one of unspeakable anguish.¹¹

Being falsely accused is the stuff of nightmares for the average person, for it compounds hidden feelings of powerlessness and shakes one's faith in the foundations of society. "Most of us dread injustice with a special fear."¹² The relationship of the individual to society and law must be explored to elaborate upon this theme, although herein the treatment will be very brief. According to the liberal mainstream contractarian view, as members of society we are all required to submit to the law. In return, people are supposed to receive protection from the criminal acts of fellow citizens and acquire "a profound right not to be convicted of crimes of which they are innocent".¹³

This right is one of the cornerstones of an orderly society. Where it has been trampled upon by the criminal justice system, the individual and society are fundamentally threatened.

Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime.¹⁴

... a miscarriage of justice by which a man or woman loses his or her liberty is one of the gravest matters which can occupy the attention of a civilized society.¹⁵

When the state not only fails to protect the law-abiding citizen from harm, but permits a person to be deprived of liberty as a result of a false accusation, a special injustice has thereby occurred. Ronald Dworkin's concept of moral harm assists in giving expression to the instinctive feelings which such situations evoke. Basically, he maintains that we distinguish in our own moral experience between bare harm, such as loss of liberty, and the further injury or moral harm which is inflicted when one suffers the same consequences as a result of injustice. What is already unpleasant becomes unbearable to the individual whose experience has unjust roots.

What good does the payment of compensation do once such a miscarriage of justice has been shown? Obviously, mere money "cannot right the wrongs done" or "remove the stain that [the accused] will carry for the rest of his life"¹⁶, but compensation can have some ameliorative effects. It can minimize the social stigma under which the accused has existed and contribute to a feeling of vindication for the innocent accused. It can help the accused to be integrated with mainstream society and can assist in planning for a brighter future, while contributing to the sustenance of dependents.

With respect to the criminal justice system and beyond, to society at large, payment represents a partial fulfillment of the obligations of the state in the face of its unjust interference with the liberty of the accused. Public respect for the system may thereby be restored or heightened by this admission of error and assumption of responsibility. Conversely, where compensation is either unavailable or ungenerous or where there is no as of right payment and discretion is retained by the executive, the state has clearly indicated the low priority it gives to the plight of the wrongly convicted.¹⁷ The costs of legal errors of such huge proportions are thereby borne by individuals and not by the state, which thus conceals the financial and policy implications of its malfunctioning criminal justice system.¹⁸ Compensation for the accused, however, may actually lead to some improvements in the operation of the criminal justice system by encouraging norms of caution and propriety in police and prosecutors. From a compensatory viewpoint, the wrongfully imprisoned qua victims are essentially similar to those who are already offered some redress through criminal injuries compensation boards. For that matter, both of these classes of victims are not readily differentiated from other groups where society has decided to assume the costs of either natural disaster or more aptly here, social malaise.¹⁹ Crude individualism is even less appropriately invoked to deny compensation in the

context of the unjustly imprisoned where the state itself has intentionally, if mistakenly, occasioned the suffering of the accused.

As with any mention of issues which bear upon the relationship of the individual to society and law, this discussion contains many implicit ideological assumptions, particularly in its allusions to a contractual connection between state and citizen. Further speculations of a jurisprudential character are to be welcomed, both on the significance of wrongful conviction and on the justifiability of compensation. However, one is hard pressed to find general perspectives on crime and society which would be used to refute the arguments presented on the appropriateness of compensation. If one dominant view is taken, then crime might be said to originate in basic economic calculations by criminals, or in some people just being bad types or making evil choices. Alternative outlooks might relate criminality to the need of the elite to criminalize threats or to the problem of crime being overstated, especially if crime can be seen as excusable or justifiable.²⁰ Any of these notions of the origins or importance of crime can still theoretically tolerate both the possibility of systemic error and the need to provide vindication and material redress for the person who has been wrongfully labelled a criminal. Ultimately, convicting a person wrongfully means that a perpetrator is still at large and that an innocent person has suffered an injury which should be rectified. Fundamentally, there is something appealingly symmetrical about a system which emphasizes due process and the presumption of innocence and compensates those whose experience falls short of the judicial ideal. However, international law may also inform legal analysis and inspire policy discussions.

2. Canada's International Legal Obligations

It is submitted that Canada's position in the international legal order obliges it to introduce a statutory scheme for indemnifying victims of

miscarriage of justice. Canada ratified the International Covenant on Civil and Political Rights and the Optional Protocol to the Covenant on August 19, 1976.²¹ Since then "... the Covenant has constituted a binding obligation at international law not only upon the federal government, but the provincial governments as well."²² Individuals who maintain that their Covenant rights have been violated may, by article 1 of the Optional Protocol, complain ("bring a communication") to the Human Rights Committee (established in Article 28 of the Covenant). The Human Rights Committee considers and determines whether a communication is admissible and if so whether a violation has occurred²³ and publishes the results of its deliberations (its "views") in its Annual Report to the General Assembly. According to the various Reports, Canada has been the subject of approximately 22 such communications between the Thirty-Second (1977) and Forty-First (1986) Sessions, although none have directly raised Article 14(6) noted below. No decision of the Committee carries any power of enforcement, but publication may cause the conduct of the state party to be impugned in the international community.²⁴

The Covenant imposes three important obligations on the signatories, under Article 2:

1. ... to respect and to ensure to all individuals ... the rights recognized in the present Covenant.
2. Where not already provided for by existing legislative or other measures ... to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. (a) To ensure that any person whose rights or freedoms ... are violated shall have an effective remedy.

(e) To ensure that the competent authorities shall enforce such remedies when granted.

Violations of the Covenant either arise from laws or actions which are contrary to the Covenant or from failure to enact laws, where required to do so

by the language of the Covenant.²⁵ For the purposes of this paper, Article 14(6) is of direct relevance:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

There is always a legitimate question to be asked concerning the extent to which international law, in general and this article of the Covenant in particular, may be seen as valid law within Canada or for that matter in the domestic law of any other country. Of course, according to the theory of Parliamentary supremacy, a competent legislative body may enact a statute inconsistent with an international legal obligation. However, in the face of statutory ambiguity, the courts will construe legislation as if the country has not intended to legislate in violation of its international commitments and to try to save the international position if possible. Beyond this rule of statutory construction at the very least, "It would be to take an unduly cynical view of international legal arrangements to regard these provisions as being entirely inefficacious."²⁶ Rules and principles of international law may respectively provide assistance in interpreting constitutional guarantees, as argued *infra*. They may also be authoritative "as guides to the elaboration of the common law and as constraints to the operation of rules of decision."²⁷ Therefore, even if Article 14(6) does not immediately create a readily enforceable legal right, it might well come into play were a court seized with a matter raising relevant issues. It must also therefore be seen as a vital reference point in any policy discussion and critical to the assessment of Canadian legal initiatives.

Canada presently has no legislation whereby victims of miscarriages of justice will certainly ("shall") and as of right ("according to law") be compensated. Before the recent promulgation of the Guidelines everything was left to common law remedies, to executive decisions to grant ex gratia payments or to the mainly unexplored use of the courts' power to award damages for a constitutional violation. With the Guidelines being adopted, it remains to be seen whether Canada has yet lived up to the challenge presented to it by the Covenant. The failure by Canada to implement laws which would give expression to Article 14(6) was noted by the Human Rights Committee in their review of Canada's initial report in 1980.

It was noted that Canada provided only for ex gratia compensation in the event of a miscarriage of justice whereas compensation, according to the Covenant, was mandatory.²⁸

By 1984, the Committee in its General Comments noted that this gap was pervasive among States' parties:

Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many States' reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.²⁹

In its comments on Canada's supplementary report in 1985, Canada's somnolence was again a subject of discussion:

Finally, observing that, by not providing compensation in cases of miscarriage of justice, Canada was failing to comply with article 14, paragraph 6, of the Covenant, one member considered that the situation should be remedied.³⁰

Canada's representative to the Human Rights Committee was reassuring on this point. Although one has yet to see any concrete legislative results there has been a Federal-Provincial Task Force and subsequently the introduction of the Guidelines so that the following comment may be partially justified in retrospect.

The matter of compensation for miscarriages of justice, which had been raised by members, was of great concern to Canada. The matter was being given active consideration at both the federal and provincial levels and article 14, paragraph 6, of the Covenant was a very significant element in the analysis being carried out by the federal authorities.³¹

Canada's next periodic report, first due in April 1985, was rescheduled to be received in April 1988, the postponement being at Canada's request to "enable it to present in that report a better evaluation of the impact of the Canadian Charter of Rights and Freedoms on Canadian laws and administrative practices".³² It would surely be to Canada's embarrassment if the reminders of the Human Rights Committee and the remarks of Canada's representative were to again come to nothing compared to the expectations of the Committee. Canada's report had not been tabled by the date when the latest Human Rights Committee Report was prepared, September 27, 1988.³³ Canada will likely rely upon the Guidelines as satisfying the onus of the Covenant. It will be argued herein that Canada's non-statutory response is deficient both when measured against the Covenant and, accepting that the Covenant is a baseline only, when compared to what ought to be done to compensate the wrongfully convicted. Canada's defence vis-a-vis the covenant will presumably be that it has brought in (to use the language of Article 2(2)) "other measures as may be necessary to give effect" to the rights guaranteed in Article 14(6). It will be suggested that this contention will probably not be accepted by the Human Rights Committee. One does find at least one author who appears to concur with the argument advanced herein on the weaknesses of the Canadian position. Professor John Humphrey, admittedly writing before the Guidelines were agreed upon by the ministers responsible for criminal justice, observed that:

There is no provision in the Charter [of Rights and Freedoms] corresponding to articles 9(5) and 14(6) of the Covenant on Civil and Political Rights which say that persons who have been victims of unlawful arrest or detention or falsely convicted of a criminal offense shall have an enforceable

right to compensation. It may be, indeed, that in Canada such rights are not even guaranteed by the ordinary law. If that is so Canada is in default under article 2(2) of the Covenant.³⁴

3. Contrary Arguments

There are serious issues which must be confronted before any state can put a plan into statutory form, especially on the matter of the range of potential recipients who will be compensated. What follows next is an introduction of the main arguments against compensation being paid to persons who have been wrongfully convicted.

One point likely to be raised is not really a question of principle. Basically, some critics will say that there are practical problems in projecting the extent and frequency of liability. Others will be more prosaic and say simply, "What will it cost?", implying that it will be too expensive, given the duty of government to maintain the fiscal integrity of the state. One might first throw back the traditional rejoinder: What price justice? This response involves a rejection of the question and does not permit any middle ground involving assessment and minimization of costs. This position is based on an assumption that it is simply imperative that the state make amends for its infliction of harm on innocent citizens. More pragmatically, the answer to the judicial cost accountants might be a prediction that the outlay would not be great in any event, at least if one is only dealing with the extreme cases of miscarriage of justice.³⁵ If it is necessary to compromise, choices could be made in terms of, for example, excluding some potential recipients, or providing for factors which could reduce awards. However, the worries over the extent and frequency of liability and concomitant costs are really of a trifling nature in comparison to the condemnatory statement such prospects make about the reliability of the criminal justice system.

Next, one might expect it to be said that errors are both inevitable and excusable in a legal regime which defends the citizenry against crime. The argument would urge that the discovery of mistakes shows the vigour of the system and that the person who is wrongfully found guilty and imprisoned is adequately dealt with by being pardoned and released. This rationale hardly seems defensible unless one is content with the patent inadequacies of the status quo.

The issues of the effects of various types of compensation schemes on the many actors within the criminal justice system are more challenging, but should not daunt policy makers. For example, would police and prosecutors be less vigorous in their work, with the spectre of liability for the state looming over their deliberations or would apparently extraneous considerations come to be built in to decisions on prosecutions? Would juries be less willing to acquit, if the acquittee might be entitled to compensation? Would an already overburdened criminal justice system in a complicated federal state grind to a halt under the weight of a whole new range of factors relating to compensation? None of these questions can be answered with precision in advance of the creation of a liberal compensatory scheme. However, the early experience of several states suggests that these fears³⁶ are both pessimistic and groundless. Indeed, according to reports, just the opposite forces may be at work. False convictions "may instill in the minds of many jurors and other citizens' doubts as to the guilt of large numbers of accused ..." ³⁷ and in those countries which operate statutory schemes of compensation, there has been no "damage to the prestige of the judicial system".³⁸ As has been earlier observed, it is at least as plausible that there would be increased reporting, more reliable prosecutions and higher general public regard for the criminal justice system if serious errors were admitted and redressed.

Finally, it might be said that in the mature Canadian legal system, there

are ample avenues for the wrongfully imprisoned to pursue and that no new appendage needs to be grafted on to the existing panoply of remedies. The following discussion should help to demonstrate the unreality of this argument.

C. Existing Conventional Remedies

It is difficult to find evaluative material, but among independent commentators there is virtual unanimity that the regular remedies available in the United Kingdom³⁹ and in many states in the United States⁴⁰ are woefully inadequate for the special circumstances of one who has been wrongfully convicted and imprisoned. In Canada, one is not likely to be able to find any comprehensive discussion of the issue. However, it is the author's view that the Canadian situation is, if anything, as bad as it is in other states which do not have statutory schemes. Sadly, no Canadian government has provided relief on this foundation as seems to be required by the International Covenant on Civil and Political Rights. Until the Guidelines were introduced in 1988 (which will be assessed infra), there was not even an authoritative national policy statement with respect to ex gratia payments, which the British have had for at least thirty years.⁴¹ At the provincial level, Manitoba had introduced Draft Guidelines in 1986, but they did not take on a statutory form after they were tabled in the Legislature.⁴² Also, it is of interest to note that in 1983 Quebec was said to have set up a task force to examine the question of compensation, which made recommendations to the Minister of Justice. By 1989, no legislation had emerged, from Quebec or any other Province or Territory.⁴³ The author is unaware of any other provincial guidelines, bills or legislation which may have been promulgated before the new Guidelines.

The conventional remedies outside the Guidelines do not provide anything beyond the scent of redress when the actual prospects of recovery are assessed. What follows in this section is an overview of the avenues which might be open to

an unjustly convicted person in 1989 beyond the Guidelines, with some summary evaluative comment. Although, it might be urged that the attention of government in Canada was only very recently focussed on the issue of compensation, Canada's neglect of the area should be seen as having created a pent up policy demand for progressive action.

1. Torts

Three preliminary observations should be made before any nominate torts are discussed. Firstly, the law of torts, while it may have slowly evolved with changes in society in other areas, has not developed a recovery mechanism which would effectively compensate a person who has been wrongfully convicted and imprisoned. Relatively new obligations have been imposed on Canada as a result of the International Covenant on Civil and Political Rights. Societal attitudes have latterly begun to move in the direction of the victim of miscarriage of justice. The common law of torts has lagged behind and it has been left, probably appropriately, for Parliament and the legislatures to intervene.⁴⁴ Secondly, as Professor Cohen and Smith have argued, private law in general and torts in particular are singularly ill-suited to deal with issues which fundamentally concern the nature of the state and the relationship of the individual to the state and the law.

... the legislatures and courts, in developing rules of public conduct and responsibility premised on private law tort concepts, have failed to consider a wide range of factors which should be recognized in articulating the relationship of the private individual and the state...⁴⁵

...rights against the state are qualitatively different from rights against individuals.⁴⁶

Thirdly, civil litigation is almost by definition complicated, protracted, uncertain and expensive, a fortiori where the cause of action is both nascent and brought against a defendant such as the Crown, with bottomless pockets and a strong need to vindicate itself.⁴⁷ Fourthly, there are formidable barriers

against the successful suit of the Crown, both in statutory and common law form.⁴⁸

The two torts which spring to mind as having some relevance to the person who has been wrongfully convicted and imprisoned are false imprisonment and malicious prosecution, the latter as one species of abuse of legal procedure. The third prospect in tort is maintaining an action for negligence in the performance of a statutory duty.

(i) False imprisonment

False imprisonment begins to appear unsuitable even at the definitional stage where it is variously described as "... the infliction of bodily restraint which is not expressly or impliedly authorised by the law"⁴⁹ or "... the wrong of intentionally and without lawful justification subjecting another to a total restraint of movement ..."⁵⁰ "The word "false" is intended to impart the notion of unauthorized or wrongful detention."⁵¹

However, even if the initial arrest is fundamentally flawed there are still limits on the usefulness of this action for the wrongfully incarcerated. Any interposition of judicial discretion effectively ends liability for the person who subsequently confines the citizen.⁵² This means that the arrest, if made pursuant to a warrant is not actionable, as warrants are issued only under the authority of a judicial officer.⁵³ The prospective plaintiff in false imprisonment is thereby left with little even in the case of an unjustifiable arrest without warrant, where the proceedings otherwise take their judicial course.

Thus, a claimant may be able to advance a false imprisonment claim for the very small period of time between the warrantless arrest and the arraignment if no probable cause existed at the time of the arrest.⁵⁴

(ii) Malicious Prosecution

Where the basic procedural formalities have been observed, there may still be liability for abuse of legal procedure in general and for malicious prosecution in particular, where the plaintiff has been subjected to unjustifiable litigation. To succeed, the plaintiff must establish, once damage has been proved:⁵⁵

1. Institution of criminal proceedings by the defendant; and
2. The prosecution ended in the plaintiff's favour; and
3. The prosecution lacked reasonable and probable cause; and
4. The defendant prosecutor acted in a malicious manner or for a primary purpose other than carrying the law into effect.⁵⁶

The major text writers are virtually unanimous in noting in respect of this tort that such primacy is given to the protection of the perceived societal interest in the efficient administration of the criminal law that the action is for all practical purposes defunct. "... the action for malicious prosecution is held on tighter rein than any other in the law of torts."⁵⁷

... it is so much hedged about with restrictions and the burden of proof upon the plaintiff is so heavy that no honest prosecutor is ever likely to be deterred by it from doing his duty. On the contrary ..., the law is open to the criticism that it is too difficult for the innocent to obtain redress. It is notable how rarely an action is brought at all, much less a successful one, for this tort.⁵⁸

Once the above impediments have been surmounted, at least the plaintiff will not be further stymied by the assertion of absolute immunity for the Attorney-General and his or her agents, the Crown attorneys, which the Nelles case has determined "is not justified in the interests of public Policy".⁵⁹ The Supreme Court of Canada noted that the former doctrine of absolute immunity had

the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted.⁶⁰

(iii) Negligence

That breach of a statutory duty may give rise to a civil action is now quite well established as is the related principle that damages may be awarded for negligent government activity.⁶¹ The duty in the context of criminal investigations will normally be specified in legislation and will typically say that the police "... are charged with the enforcement of the penal provision of all the laws of the Province and any penal laws in force in the Province".⁶² Assuming that the police have engaged in an investigation of an offence, albeit a flawed one which has led to the wrong person being convicted of an offence, how might liability attach? The police would have performed their statutory duty, so that there would be no breach of the obligation to enforce the law. However, if the actions of the police were undertaken bona fides but negligently, then there would still be potential liability. The elements of actionable negligence in a conventional suit⁶³ must still be proved in the present context:

- (a) the existence of a duty to take care owed to the complainant by the defendant;

There is a duty to take care in the performance of the statutory obligation of enforcing the law which is owed to all citizens and specifically to those who are suspects.

- (b) failure to attain that standard of care prescribed by the law, thus committing a breach of the duty to take care;

The statutes do not elucidate a standard of care, although the common law concept of the reasonable person would be able to be adapted here as it has been in so many other areas. To paraphrase Alderson, B.'s classic words,⁶⁴

Negligence is the omission to do something which a reasonable police officer, guided by those considerations which ordinarily regulate the conduct of criminal investigations, would do, or doing something which a prudent and reasonable police officer would not do.

The usual reference points of "the likelihood of an accident happening and

the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution"⁶⁵ would provide some assistance. Predicting the resolution of this issue is still not rendered much easier, particularly given that a high degree of deference would likely be shown to police practices and that there are few precedents.

- (c) and, damage suffered by the complainant, which is causally connected with the breach of duty to take care and which is recognized by the law.

Grave problems would be encountered with causation. As the damage would be the wrongful conviction and imprisonment, it becomes extremely difficult to establish the causal connection where a judge or jury have interposed their independent decision making to enter a conviction. Of course, the negligent investigation of the police officer may have contributed to the cause.⁶⁶ None the less the verdict of a neutral third party supplies the novus actus interveniens which may break the chain of causation between the act of negligence and the injury.⁶⁷ Beyond this factor is the general flexibility with which "operational decisions" containing within them some element of discretion may be viewed by the court, what Wilson J. in Kamloops called "policy considerations of the secondary level".⁶⁸ Finally, in light of Nelles (albeit not argued in negligence), Crown immunity could again be the ultimate defence to an otherwise successful action. Although there may have been some erosion of earlier law in the context of negligence, even where there is some discretionary power, Nelles none the less emphasizes the forcefulness of the statutory protections for the Crown when discharging responsibilities of a judicial nature.⁶⁹

While there are ostensible prospects for recovery in tort, the wrongfully convicted person is forced for all practical purposes to go elsewhere to find a predictable and suitable remedy.

2. The Charter of Rights and Freedoms

(i) General Principles: Interpretation and the International Covenant

Any prospective plaintiff whose rights have been infringed would, in 1989, certainly turn to the Charter for relief when conventional common law channels seem to be unpromising. The first obligation is obviously to demonstrate that a right or freedom as guaranteed by the Charter has been infringed, according to section 24(1). There are several sections which may have been offended in the instance of a person who has been wrongfully convicted as a result of a miscarriage of justice. One thinks readily of the umbrella protections offered by section 7 as well as some of the relevant particular guarantees, such as sections 9, 11(d) or 12. Assuming one could prove such a violation, there could be some difficulty in rebutting the government's attempt at showing that the applicant's right or freedom was subject to a reasonable limit under section 1. A full discussion of these preliminary issues will not be attempted in this paper. Nonetheless, it is surely safe to say that such litigation would be novel and that proof of an infringement would be a formidable obstacle indeed. The Nelles case does offer some encouragement, at least in the extreme instances where the elements of malicious prosecution are made out:

... it should be noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the Canadian Charter of Rights and Freedoms.⁷⁰

Further, the International Covenant on Civil and Political Rights could be summoned as an aid to the interpretation of the Charter, which might have quite salutary results. Several Canadian authorities have presented strong arguments to this effect.⁷¹ Basically, the close historical, textual and subject-matter relationship of the Charter and the Covenant is emphasized. Further, there is the presumption that Canada has not intended to violate its international

obligations. In the event of ambiguity, Canadian courts should interpret Canadian legislation and presumably the Charter in a manner which conforms with international law. Also, one sees increasing enthusiasm on the part of Canadian courts to go outside national boundaries to assist in deciding issues arising under the Charter. Of course, the Charter does not provide explicit protection of Article 14(6) rights,⁷² but there are good prospects for believing that a Charter case would have to be more than cognizant of Canada's being a signatory to the Covenant. For example, commenting upon Article 9(5) of the Covenant which, like Article 14(6), obliges the state to ensure that a person who has been unlawfully arrested or detained "shall have an enforceable right to compensation", Mr. Justice W.S. Tarnopolsky notes:

There is no explicit constitutional or statutory provision in Canada to this effect. However, surely this right must be considered to be a requirement of section 7, as a "principle of fundamental justice" when a person has been deprived of liberty.⁷³

Therefore, the courts should infuse a Charter suit with some of the compensatory entitlements of the International Covenant. That this approach ought to be taken to the interpretation of Charter provisions was given powerful support by the dissenting judgement of Chief Justice Dickson in the 1987 case, Reference re Public Service Employee Relations Act (Alta.). He was concerned to emphasize the relevance of international law to the construction of the Charter.

The content of Canada's international human rights obligations is, in any view, an important indicia of the meaning of "the full benefit of the Charter's protection". I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's obligations under human rights conventions.⁷⁴

(ii) The Prospect of Substantial Damages

Assuming that a wrongfully convicted person has met the initial challenges noted above with respect to showing an infringement of a Charter right or freedom,, he or she would then (under section 24(1)) have to apply "to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

Although there is a relative dearth of cases dealing with damages as a remedy for a Charter violation, it is by now beyond question that this is part of the remedial arsenal with which the courts are equipped under section 24(1). Cases⁷⁵ and juristic writing⁷⁶ have both consistently confirmed this basic proposition, which should not be surprising given the apparent breadth of the remedies portion of the Charter. The principal impediments would appear to relate to the issues of causation and responsibility for the infringement and the type and extent of loss to be compensated. Problems could therefore be encountered concerning whether only direct, consequential and provable injuries would be compensated or whether the right infringement per se would also be the subject of an award. The typical requirements of precisely showing a link between the denial and the loss should be minimized in the context of constitutional litigation, once the right has been shown to have been violated. The protection of constitutional guarantees should be considered to be more important than the usual compensatory interests. Finally, the violation of the right itself should deserve special protection in the award, above and beyond paying damages for the heads related to actual suffering. For the wrongfully convicted and imprisoned, the foregoing general statements can be made with greater force, as the loss of liberty and all the attendant deprivations speak volumes on the issue of the reality of the injury. The infringement itself deserves extraordinary treatment, given the importance of vindicating the victim

and highlighting the significance of the constitutional loss for the society as a whole.

The above discussion, is not intended to leave the impression that a Charter action is the panacea for the wrongfully convicted and imprisoned. Firstly, at a policy level it is not likely that leaving the issue of compensation with the courts satisfies Canada's obligations under the International covenant, which the Federal-Provincial Task Force Report has recognized.⁷⁷

Secondly, and more relevant to an applicant, the observations made earlier concerning civil litigation in general are just as apt with respect to a Charter action, especially as it remains a relatively unusual form of damages suit, with many additional substantive and remedial wrinkles. Therefore, compensation would be no closer in a Charter action than in a conventional torts case.

3. Ex gratia compensation

Actual payments of compensation in Canada (and other countries) have come about most often as a result of the decision of government to make an ex gratia payment. These payments "are made at the complete discretion of the Crown and involve no liability to the Crown".⁷⁸ Further, "Being in the nature of an ex gratia payment, there are no principles of law applicable which can be said to be binding."⁷⁹ Even in the United Kingdom where there have been authoritative policy statements on the existence of the ex gratia scheme since 1956,⁸⁰ which were strengthened in 1985,⁸¹ judicial review of a refusal to make a payment has been unsuccessful.⁸² Obviously, the standards of the International Covenant are not met by such discretionary awards. A proper legislative scheme need not prohibit a discretionary payment by government to a deserving recipient. Indeed, there may be instances where the flexibility accorded by ex gratia compensation may be quite appropriate and laudatory. Government might well decide to pay compensation sooner, or more generously than a statutory scheme might permit.

Finally, it is possible that some claimants might be excluded, in which case a voluntary payment might be made.

However, the disadvantages of an ex gratia scheme are sufficient to confine it to such exceptional use, outside a statutory framework. Firstly, there is no obligation to pay, as both international law and an inherent sense of fairness and justice require. Secondly, there may be few or no guiding principles for the decision-maker. Thirdly, even if adequate guidelines are introduced, they could be circumvented or flouted. Fourthly, the process is or may be shrouded in secrecy. This is surely unsuitable, given the openness of much of the criminal process and the general public interest in seeing why and how government makes decisions. Fifthly, an exclusively voluntary scheme tends to trivialize the nature of the potential claims, making the interests affected seemingly suitably responded to by largesse or charity.

The Federal-Provincial Guidelines will be studied more closely in this paper, but parenthetically it might well be questioned at this juncture whether anything more than ex gratia compensation is really being offered in them. Clearly, they are not legislatively enacted by any level of government and the obligation if any, to appoint an inquiry only arises once the eligibility criteria, themselves problematic, are met. The final procedural stipulation (at p. 3 of the Guidelines) is merely that the relevant government "would undertake to act on the report submitted by the commission of Inquiry" [emphasis added]. There is little more by way of obligation added by these aspects of the Guidelines and surely not enough to distinguish them fundamentally from the features of simple ex gratia compensation, so often decried in other jurisdictions.

4. The Special Bill

Compensation could be ordered upon the passage of a special bill dealing

with the circumstances of a single case. Normally, this would come about through a private member's bill in the appropriate legislative forum. A government bill would presumably not be required, as the executive could always order an ex gratia payment, if it were so inclined.

In some states in the United States, similar devices are employed, often as a way of circumventing state immunity and thereby permitting an otherwise unpursuable claim to be advanced. The results have not been viewed favourably. In Ohio, Hope Dene has commented:

Assuming that the claimant can clear all of these hurdles, there is simply no guarantee that the bill will pass... This severe unpredictability inherent in such claims is antagonizing for the individual seeking relief, and is definitely not mitigated by the awareness of the fact that no cause of action exists against the legislature for failure to act on a bill.⁸³ [footnote references from original text omitted]

In New York, the experience has been no more satisfactory. David Kasdan has criticized the ad hoc and arbitrary nature of such fact-specific bills⁸⁴ and further notes that:

Because the bills virtually concede state liability, they are often vetoed. Thus, moral obligation bills usually fail in their essential purpose - the creation of a forum in which to litigate fairly a wrongful imprisonment cause of action against the state.⁸⁵

Due to the publicity inherent in the legislative process, some of the potential deficiencies of the ex gratia scheme are avoided. However, many of its disadvantages are simply replicated especially in that the special bill still depends on a type of government support and issues of principle and obligation may never be faced. If anything, the special bill may have some residual significance, both now and under a new statutory framework. Although a private member's bill may be doomed to legislative failure, it does force a case into the open and may occasion legislative and public debate. Under the current system, public pressure may be crucial to the decision to make an ex gratia payment and

to the extent that a special bill contributes to this outcome, it could be a useful instrument. Under a statutory formula, the private member's bill could highlight and advance a marginal case.

D. Towards a New Regime of Compensation

Existing conventional alternatives for the payment of compensation have been seen as woefully inadequate. What is called for is a fresh start. The Federal-Provincial Task Force Report and more importantly the Federal-Provincial Guidelines are measured against this perceived need for innovation. They represent an important government initiative, even if they do not, as is concluded, represent much of a departure from previous practice or policy. Further, as befits the circumstances, the following discussion attempts to establish norms of state conduct with respect to this most egregiously treated group of citizens.

Article 14(6) of the International Covenant on Civil and Political Rights is used as the organizing device for this portion of the paper for a number of reasons. Firstly, the Covenant is binding upon Canada and its standards must at a minimum be met by signatory nations. Secondly, it raises many of the material points which must be addressed. Thirdly, the Federal-Provincial study used a similar approach and as it has presumably been influential on governments, it is expedient to choose the same base. It should be stressed that although Canada must adhere to the Covenant, it is really only a point of departure. There are some areas where Canada ought to diverge, either to improve the compensation scheme to a level beyond the rigid strictures of the Covenant or to adapt it better to the Canadian legal and constitutional environment. Wherever appropriate, analysis of the Guidelines will be integrated into the following discussion.

For convenience, Article 14(6) is reproduced below, with emphasis added to

indicate the specific areas which will be reviewed:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

1. "Person" - Should only the imprisoned person be compensated?

The Covenant seems to provide for compensation being payable only to the individual who has been convicted and suffered punishment. However, an examination of some of the debates which led to the present version of the Covenant provides some support for a more liberal interpretation. Through several discussions of the Commission on Human Rights prior to the acceptance of the final incarnation of Article 14(6), there was explicit mention of persons other than the accused, albeit for the limited category of cases where the accused was put to death.⁸⁶

The provision was deleted, but there were second thoughts on the issue as there was an unsuccessful attempt to revive the article.⁸⁷ Much later (1959) in the evolution of Article 14(6) there were still concerns over the extent to which dependents should be compensated, which were never resolved in the text or debates.⁸⁸

In the same spirit as some of the old United Nations debates evince, the Federal-Provincial Report notes that the person's dependents and possibly even business associates might also have some right to present a claim, although the Report finally recommends that only the person directly wronged be able to proceed. The Report concedes that dependents should be able to apply after the death of the wrongly accused person.

With respect to the position of the Report on the survivorship of claims,

there can be little disagreement. Further, it is not unreasonable that the convicted person should be required to present the primary claim. However, there are no compelling reasons to refuse to add others who have suffered injury as parties to the principal action, and who might thereby be ultimately able to recover independently once the accused's cause has been established. The Task Force Report notes that other countries "allow for such a broadly based compensation scheme".⁸⁹ The 1982 Justice Report similarly recommends that dependents should recover expenses or losses reasonably incurred upon imprisonment.⁹⁰ Family members (who are not dependents) and friends, who have suffered losses directly as a result of the imprisonment should be able to make a claim. So should those who have rendered services to assist in securing the individual's release and vindication, although some items in this latter category could legitimately be included as expenses recoverable by the actual victim in the pecuniary loss category. The Thomas Commission wrestled with these issues, but finally decided to recommend payments to Mr. Thomas to cover legal and investigative services and services "rendered by relatives to meet a need caused by his arrest and imprisonment".⁹¹

This more open posture with regard to those eligible to claim recognizes a number of important factors. Firstly, it accepts the interdependence of individuals in society and the clear fact that people seldom suffer misfortune alone. Secondly, it offers a sense of legitimacy and encouragement to those who have been hurt by the plight of the wrongly convicted person or who have laboured, often solitarily, on his or her behalf.

There are thus sound underpinnings for a decision to widen the possible recipients of compensation beyond the narrow wording of the Convention. Unfortunately, the Guidelines do not view the issue so expansively and would permit only the "actual person who has been wrongfully convicted and imprisoned"

to apply.⁹²

2. "By a final decision"

Article 14(6) requires some definite point in the criminal justice process to have been crossed before the other elements in the article must be considered. The difficulty is in giving meaning to the phrase "final decision". The Federal-Provincial Task Force Report states that the words could mean either (i) once the decision is reached at trial to enter a conviction (and presumably hand down a sentence) or (ii) once all ordinary methods of review have been exhausted (and the adverse decision remains). The Report opts for the latter interpretation.⁹³ This view is taken despite the observation that an examination of article 14(6) when read as a whole suggests that "the Covenant proposes to cover both types of final decision" [emphasis added].⁹⁴

Once again, some limited assistance in interpretation may be derived from a study of the history of the Covenant. An earlier version of Article 14(6) was more generous than the current provision:

Everyone who has undergone punishment as a result of an erroneous conviction of crime shall have an enforceable right to compensation.⁹⁵

The reference to a "final decision" came later with other more restrictive stipulations. What is clear is that "many representatives thought that the wording of [the current article] would only cause great uncertainty in its present form."⁹⁶

Representatives eventually rejected⁹⁷ the insertion of any explanatory clause with respect to the issue of finality in either Articles 14(6) or 14(7). Despite these uncertainties, it appears there is some evidence of acceptance of a core meaning of "final decision". In the words of the Venezuelan delegate:

There was no need for a lengthy definition of the term "final decision", since that concept existed in all legal systems. It would be preferable to leave it to each country to specify

which decisions had the force of res judicata.⁹⁸

Similar results seem to have been arrived at with respect to the interpretation of the same words in a European convention where a decision was said to be final

if, according to the traditional expression it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies...⁹⁹

In this paper, the determination was made to limit the discussion to those worst affected by a malfunctioning of the criminal justice process - the wrongfully convicted and imprisoned person whose plight is only exposed through exceptional means, beyond the regular appeal process. The case for compensation in these instances is beyond question either pursuant to Article 14(6) or on broader principles.

However, why should persons convicted wrongfully not still be able to request compensation especially if they have been imprisoned, even if it is merely a trial decision which has been reversed on the basis of a regular appeal? This is broadly comparable with the recommendations of the Justice Report¹⁰⁰ and interprets the function of compensation sympathetically: to restore to wholeness, in so far as it is possible, those who have been wrongfully convicted and to indicate the acceptance of societal responsibility..

The most supportable interpretation of Article 14(6) is that it is intended to compensate for miscarriages of justice only, omitting for the moment the imprecision of this concept. Thus the conventional reversal and extraordinary pardon provisions would be read conjunctively with "shows conclusively that there has been a miscarriage of justice." Indeed, this view has been adopted in the deliberations of the Commission on Human Rights and in the Human Rights Committee, where the phrase "miscarriage of justice" was used repeatedly. In

reply, it is submitted that such distinctions, between persons whose convictions have been reversed in the normal process and citizens who have been victims of miscarriages of justice, are too stringent. A more generous approach to compensation is lent support by an examination of Article 9(5) of the Covenant: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." It seems illogical to provide redress for one who has merely been unlawfully arrested, although perhaps never even charged or detained beyond the initial arrest, and to refuse compensation to a person who may have been convicted and sentenced to prison, but where the conviction is set aside in a regular appeal.¹⁰¹

There are strong reasons to be sympathetic to compensation being paid on a more liberal basis than the Covenant, Task Force Report and Guidelines advocate. Regrettably, the Guidelines opt for the more confining straits of a free pardon or Ministerial reference being required to show that there has been a miscarriage of justice. Specifically excluded are circumstances where the reversal occurs in the regular stream of appeals.

3. "Convicted of a criminal offence"

In Canada this expression could be read narrowly to require compensation to be paid only where the offence for which the person was wrongfully convicted was "criminal in the true sense".¹⁰² This interpretation would therefore exclude from the ambit of the Covenant all provincial offences, because the provinces "cannot possibly create an offence which is criminal in the true sense".¹⁰³ Also excluded would be all federal offences, for which a penalty may be provided but which are not normally considered criminal.

The Task Force Report quite appropriately took the view that such an approach "would inadequately reflect the spirit of the International Covenant", given that in a federal state such as Canada penal measures including the

possibility of imprisonment attach to federal and provincial statutes.¹⁰⁴ The Report also refers to the French version which uses the expression "'condemnation pénale' which suggests compensation should not be limited to wrongful criminal convictions"¹⁰⁵ and finally recommends that compensation be available to persons unjustly convicted under either federal or provincial penal legislation.¹⁰⁶

These conclusions are laudable and are well-supported in the Task Force Report. The only additional factor to which attention should be drawn is Article 50 of the Covenant which specifically mandates that "The provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions." The authors of the Task Force Report do not cite this article, but it surely makes the construction urged in the Report and herein more or less unassailable.

The Guidelines considerably dilute the recommendations in the Report. There, only a person "imprisoned as a result of a Criminal Code or other federal penal offence" is eligible.¹⁰⁷ This alteration is lamentable, although there is no obstacle to a province extending the Guidelines to cover provincial offences. How could one explain the restrictive nature of the policy behind the provision to a person who has served six months in jail for an offence which he or she did not commit under a provincial head of power? When an erroneous conviction under a potentially similar infraction within federal competence could result in compensation, it would be a difficult chore indeed.

4. "Conviction has been reversed or he has been pardoned"

(i) Improving Access to Appellate Review

Although the focus of this paper is the wrongfully convicted person whose plight is discovered and addressed through extraordinary devices, it has also been argued that compensation ought to be available to the person whose conviction is reversed in the normal course of an appeal and possibly to other

claimants. Both the Task Force and the Guidelines take the position that a condition precedent to compensation be a free pardon under Section 749(2) or an acquittal by an Appellate Court following a Section 690(b) Ministerial reference. Regardless of whether the more expansive view of compensation is taken as is argued for herein, there will be instances where the conventional appeal process has been exhausted and the usual appeal periods have expired. In those situations it is important to provide some mechanism for the circumstances of the purportedly wrongfully convicted person to be addressed in order to provide the foundations of a compensation award. This section will attempt to make suggestions for improvement of these special avenues of access to justice. The proposed reforms are also relevant if the status quo of the Guidelines is maintained, in that the Section 749(2) free pardon or Section 690(b) acquittal will be more readily obtainable.

Before discussing this aspect of Article 14(6) in detail, it is noteworthy that there was some considerable skepticism in the early debates on the Covenant about the inclusion of the requirement of a reversal or pardon as an additional qualifying condition.

The requirement that the reversal of conviction should be a condition precedent to the payment of compensation was regarded by many representatives as unduly restrictive, and also as requiring, in effect, the payment of compensation in the case of convictions reversed on appeal.¹⁰⁸

The ultimate phraseology was adopted somewhat less than enthusiastically by the Commission on Human Rights.¹⁰⁹ Therefore, there is a good foundation for interpreting this portion of the article and Canada's international obligations in a sympathetic manner.

It should be further noted at the outset that there are provisions in the Criminal Code which allow for the extension of time in which to commence an appeal against conviction and that some flexibility is thereby accorded to the

convicted person.¹¹⁰ None the less, these sections offer small comfort to the person who has already pursued all relevant levels of appeal, so that the courts have no other basis upon which to assume jurisdiction.

Extraordinary powers to direct that a new trial be held or that an appeal be heard or that a reference be provided are available to the Minister of Justice under section 690. Also, under section 749, the Governor in Council may grant a free or conditional pardon to a person convicted of an offence. The Task Force Report maintains that the discretionary component of both sections does not offend article 14(6) of the Covenant, as the article provides a right to compensation, not a right to a hearing to obtain the prerequisite reversal or pardon. The Report merely recommends that section 690 be extended to summary offences and that provisions mirroring it and section 749 be adopted by the provinces to deal with provincial penal law.¹¹¹ Although these latter suggestions are worthwhile it is maintained that a broader perspective ought to be taken which would extend the availability of re-investigations, appeals and pardons and make any residual discretionary powers more open. The Guidelines have not taken this direction.

Even taking the view of the Task Force Report that only those whose convictions were left intact by the conventional system of appeals and who are later found to have been wrongly convicted are deserving of reparations, the question remains whether the existing avenues of redress are adequate. Given that a reversal or pardon is the sine qua non of compensation and given, as noted earlier, that the Covenant requires, under Article 2(2), that each State Party take necessary steps "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant", it is submitted that the discretionary aspects of sections 690 and 749 do not adequately protect article 14(6) rights.

The first remedial suggestion would give to a provincial court of appeal an expanded right to commence or reopen an appeal, where new facts are uncovered or for other analogous reasons which tend to point to a miscarriage of justice. This leave to appeal application would be able to be brought by the convicted person at any time, even where the same court had already disposed of the case. The revised provision could also include a statement of purpose permitting some relaxation of normal rules of evidence or procedure commensurate with the occasion. This would have the advantage of giving the accused another as of right avenue with which to seek justice. It would preserve for the courts some flexibility to deny leave where the supposed new or newly discovered fact or other ground was inconsequential or irrelevant and it would leave intact some discretionary powers for the executive. The denial of leave or of the appeal could be the subject of a further appeal to the Supreme Court of Canada. What is sacrificed somewhat in this scenario is the present finality of convictions. It is urged that this would not be a major cost in the face of the prospect of uncovering more miscarriages of justice sooner. Nor should there be a deluge of appeals in this vein. However, it must be conceded that the effects on the appellate court system require further consideration. The fact that this improved right of appeal would be included in the Criminal Code (or any provincial counterparts for non-criminal matters) would seem to ensure closer compliance with article 14(6) than in the regime envisaged in the Task Force Report. Of course it is arguable that similar entitlements already exist in the Criminal Code. Section 675(1)(a)(iii) permits an appeal on any ground not mentioned in the other subsections (which basically require a question of law alone or question of mixed law and fact). The suggestion contemplated herein would merely make explicit one special ground of appeal relating to a miscarriage of justice. Given that section 686(1)(a)(iii) now permits the court of appeal to

allow an appeal "on any ground there was a miscarriage of justice", the opening of the appellate doors for a consistent purpose seems to be both a modest and reasonable suggestion.

(ii) A Structuring and Rejuvenation of Executive Powers

The second recommendation deals with the utilization of the type of powers presently available under sections 690 and 749, to order appellate review and to grant a pardon, respectively. Given the first proposal for an expanded right of appeal, the Minister of Justice would have fewer occasions when section 690 would have to be invoked. None the less, it is not suggested that such discretionary authority be dispensed with entirely. Rather it should be relegated to a less prominent place among the devices available for the correction of injustice and should be circumscribed by declared guidelines. As it stands, the Charter may already require that the refusal of a Minister to exercise his section 690 powers is reviewable by the courts,¹¹² at least with respect to the process followed by the Minister.

The other of the devices forming the bases of entitlement under the Guidelines, the power of pardon has ancient roots. Duker traces the prerogative of mercy as far back as Mosaic, Greek and Roman law, but develops a detailed history from about c 700 A.D. in England.¹¹³ Canada retains a form of this power:

Pursuant to sections 683 and 685 of the Criminal Code, a free pardon may be granted which will result in the person being deemed to have not committed the offence... Pardons may also be granted pursuant to the Letters Patent constituting the Office of the Governor General.¹¹⁴

Applications for the Royal Prerogative of Mercy are passed on to the National Parole Board for investigation and recommendation (pursuant to section 22(2) of the Parole Act) and the Governor in Council or the Governor General may finally pardon persons convicted of offences.¹¹⁵

dedication to being thorough and open. It may be that a careful ministerial statement made in Parliament and available to convicted persons would be the best vehicle to deal with this way of compensating the wrongfully convicted. Better reporting of both pardons and denials would also assist.

With enhanced rights of appeal and ministerial reference powers and a prerogative of mercy invigorated by the duty of publication, convicted persons would have increased chances to have a conviction reversed or to obtain a pardon, which are the two major procedural strains under the Covenant.

The changes proposed above become all the more important when one recalls that the Guidelines adopt quite strictly as eligibility criteria a free pardon under Section 749(2) or an acquittal pursuant to a Ministerial reference under Section 690(b). The Guidelines also stipulate that a new or newly discovered fact must have emerged, tending to show that there has been a miscarriage of justice, obviously again precluding recovery where there has been a reversal as a result of a regular appeal. To further narrow the range of eligible claims, the Guidelines demand that the pardon includes a statement that the individual did not commit the offence or that the Appellate Court acting on a reference makes a similar finding. The Guidelines do not propose any amendments with respect to either pardons or references.

The only sign of flexibility in the Guidelines appears in their willingness in Part B to allow the individual to be considered eligible for compensation in some cases where sections 749 and 690 do not apply. The example chosen in the Guidelines mentions the situation of an acquittal being entered by an Appellate Court after an extension of time. There the Guidelines provide that compensation should be payable if an investigation shows that the individual did not commit the offence. That this provision allows for some relaxation of the otherwise rather harsh standards of the Guidelines is to be welcomed. However, it would be

preferable had the Guidelines started out by permitting compensation on a more liberal basis, or, failing that, had they proposed a liberalization of the appeal provisions in the Code and generally provided for higher levels of visibility and predictability in the use of the pardon and reference powers.

(iii) Alternative Approaches

The foregoing discussion on the main avenues of access to compensation under the Covenant, admittedly approaches the procedure through fairly conventional channels. It would be advisable to remain somewhat skeptical about the role of courts or ministers in the determination of the issue of compensation. Later, it will be argued that actual quantum of compensation could perhaps best be determined by an Imprisonment Compensation Board, but it should not be assumed that such alternative structures would be wholly inappropriate to involve in the threshold matters explored in this section as well. It is surely obvious that a Minister of Justice is also an elected official with partisan interests. Of course, in many instances these very features of his or her responsibilities may augur well for the wrongfully convicted person. Public pressure may build to the point where a Minister feels that a positive response is necessary to a plea for a pardon or a reference to a Court of Appeal. On the other hand, some cases may not become cause célèbres or worse, may be the focus of antipathy despite their merits. In these instances a Minister may be reluctant to use any extraordinary powers. Similarly, Courts of Appeal are fettered with respect to the tasks at hand. They are, by their membership and function, very cautious institutions. They may be reluctant to interfere with matters which have already apparently been settled by trial courts or previous appellate review. They may, in the absence of a statutory directive to the contrary, be hampered by strict codes of evidence and procedure. Given that cases may come to a Court of Appeal either at the direction of the Minister of Justice or by way of an as of right application

for leave to appeal by a convicted person, these reservations about the courts' performance of the unusual tasks at hand in reviewing a potential miscarriage of justice may become further barriers to redress.

One response to both types of problems may be to simply expand the jurisdiction of an Imprisonment Compensation Board to permit it to actually investigate cases where there is a reasonable suspicion that a miscarriage of justice has occurred. This would be a major departure from the existing patterns of dealing with these matters and could encounter division of powers problems.¹²³ Nonetheless, with some of the above changes being made in the rules of appellate courts and powers of clemency, such a body ought not to have an enormous caseload. Further, its comparative flexibility and special purpose might well lead to the earlier discovery of injustices.

5. "On the ground that a new or newly discovered fact ... unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him"

The first part of this portion of Article 14(6) demands that the reversal or pardon must have been the result of a fact previously unknown to the court which found the accused guilty and sentenced him or her. The second aspect of this part of the Article, as paraphrased above, demands that the non-disclosure not be attributable at all to the accused.

It should be reiterated that nothing prevents the appropriate government(s) from extending the entitlement to compensation beyond that mandated by the Covenant. Neither the Human Rights Committee or any other body could criticize Canada for being more liberal in its interpretation of its Covenant obligations or providing rights superior to these standards. Particularly with respect to the second section part of this portion of article 14(6), the Guidelines may well indicate such a softening, as will be seen.

(i) "On the ground that a new or newly discovered fact"

Payment of compensation under the Covenant turns on the reversal or pardon being due to a new or newly discovered fact. The Task Force Report proclaims this element as being "straightforward"¹²⁴ and in a sense this phrase is readily interpretable from the text of the Covenant as simply requiring the change in verdict to be the result of new evidence. There is nothing objectionable about previously unknown facts now overturning a finding of guilt. However, the Task Force Report and for that matter the Covenant itself may cause some discontent in the demand that the pardon be of this special character, rather than being fully or partially attributable to other factors. Perhaps it is contemplated that other reasons for judicial error will be uncovered sooner and in conventional proceedings, but is this always a safe assumption? For example, it could be that the tribunal had all the facts before it, but none the less returned the wrong verdict due to extraordinary community pressure for a conviction. The court would have heard all the evidence and everyone would be implicitly aware of the social context of the trial, but a mistaken verdict could still ensue.

Public pressure, then, is a two-edged sword. It may be democratic pressure for social and criminal justice, or it may simply reflect public vengeance and fears, easily manipulated by demagogues who are ready and willing to oblige.¹²⁵

This illustration may seem strained particularly as it could be said that a reinterpretation of the social climate of the trial would be a "newly discovered fact". Further, it is likely that nearly all findings of guilt overturned outside the usual appeal process will be able to be classified as deriving from new facts, consistent with the wording of the Covenant and the thrust of the Report. The point of this reservation is that some residual clause ought to be inserted in any scheme providing for compensation for the unjustly convicted, thereby providing that the reversal or pardon may have been obtained "on the ground that either a new or newly discovered fact or any other factor shows ..."

This amplified basis would be more consistent with an overall dedication to providing compensation for wrongfully convicted persons.

The Guidelines take a stricter approach to the issue and insist that the pardon or acquittal be based upon a new or newly discovered fact, tending to show that there has been a miscarriage of justice. No new explanation is given in the Guidelines, so it is a fair inference that the ministers merely adopted the reasoning of the Task Force Report. This may seldom be a problem, as has been seen, but it would be relatively simple to broaden the basis for recovery. Finally, it is at least of historical interest that one of the initial drafts of the Article providing for compensation for wrongful conviction made no reference to the present requirement for the reversal or pardon being due to a new or newly discovered fact.¹²⁶

(ii) "... unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him"

According to the Task Force Report, this final phrase in the text of Article 14(6) appears to remove any entitlement to compensation if blame for the non-disclosure of the material new fact is to be laid partly or fully at the feet of the accused. Thus, the Report remarks that the Covenant has adopted "a very hard line in respect to blameworthy conduct"¹²⁷ and it recommends that not all such behaviour should automatically bar a person from obtaining redress. In the more moderate view of the Report, the accused's actions should be evaluated and compensation still awarded, assuming that there is not a complete erosion of the claim on this basis. The Guidelines seem to be sympathetic to the tenor of these observations in the Report, as will be seen.

It is a pity that the drafters of the Convention did not go on to add the logically appropriate clause to the Article, "in which case compensation may be eliminated or reduced commensurately". However, the implication of this addendum

to the Article by Canada is consistent with its apparent purpose. The stricter construction of the text of the Article does not allow for this approach. Thus, it might be maintained as a proposition that every non-disclosure is "partly attributable" to the convicted person: private investigators should have been hired, more astute counsel should have been chosen, immaterial matters should not have been lied about thereby causing the accused's credibility to be questioned, testimony should have been more forceful, articulate or coherent and so on. The text of the Article should not be used as a justification for permitting disentitlement for minor falls from judicial grace, which may be wholly beyond the reasonable grasp of the accused. Further, a careful examination of the development of Article 14(6) demonstrates that additional support for this more flexible attitude in Canada might have been found in some of the framers. One of the preceding versions of the Article provided that there should be no entitlement to compensation "if the miscarriage of justice causing his conviction were in any way attributable to his own neglect or misconduct."¹²⁸ When some discussants objected that it was "difficult to conceive of" such a situation, the present phrase was substituted on a relatively close vote.¹²⁹

Fortunately, the Report does adopt a more sympathetic line in, for example, its observation that the accused "may be very nervous and tense and as a result may not act as one might otherwise expect or in his best interest".¹³⁰ Moreover, the overall conclusion of the Report is that Canada's best course is to merely discount awards where appropriate is quite satisfactory.

It is not unreasonable to provide support for the prospect of some reduction or exclusion for the person who has contributed to or brought about his or her own conviction. The obvious example would be the person who eagerly but fancifully confesses to a crime for which he or she was not responsible. Even there, caution is in order, for the criminal justice system is supposed to find

the truth of allegations, even if the accused has been partly to blame for a particular falsehood or an atmosphere of untruth. Further, there is great imprecision in many statements to the effect that "the accused is the author of his or her own fate". How often can anyone confidently say that the accused's conduct is to be held to account to the tune of a 10% reduction of the total award? Finally, the spectre of the state simultaneously evading and projecting responsibility, in effect scapegoating and blaming the victim for its errors, must loom large in the mind of any conscientious person when it comes to assessing the relevance of the victim's behaviour.

By all means, some escape hatch or rationale reducing state liability should be reserved for the fraudulent claimant or the reckless participant in a criminal trial. Nonetheless, this feature of a compensation scheme should not be used to punish the naive, the youthful, the feeble-minded, the powerless, the members of racial minorities, the frightened, or the stigmatized, among others. If fairness and reasonableness are the bywords and full compensation the desired end, the state should err on the side of generosity. Meanness, vindictiveness, small-mindedness, or intellectual laziness should not allow the importance of the victim's conduct to be overblown.

The Guidelines evince cognizance of these arguments on the ostensibly unyielding nature of the Covenant. Firstly, the narrow issue of non-disclosure and responsibility for such conduct is not mentioned explicitly. Secondly, there is nothing in the eligibility provisions to indicate disentitlement based upon the behaviour of the wrongfully convicted person. Thirdly, the reference to "blameworthy conduct or other acts on the part of the applicant" which have "contributed to the wrongful conviction" occurs only in the short list of factors to be taken into account in determining quantum, thereby leaving open the prospect of merely having one's award diminished rather than eliminated. In this

sense, the Guidelines have refined and improved one of the more severe aspects of Article 14(6).

6. "shows conclusively that there has been a miscarriage of justice"

(i) The Elusiveness of "Miscarriage of Justice": One Way Out of the Dilemma

The authors of the Federal-Provincial Task Force Report appropriately portray this part of Article 14(6) as "the cornerstone of the right to compensation created by the Covenant",¹²¹ although the Guidelines do not advert specifically to the Covenant and use this phrase only once. Giving a definition to "miscarriage of justice" is no easy exercise.¹³² However, rather than having been constrained by this inherent difficulty of conceptualization, it may be that giving full effect to the phrase for compensatory purposes is just be too daunting for current policy makers and possibly for the public at large.

It is clear from an examination of the few cases which have attempted to analyse of the notion of miscarriage of justice that the phrase is used to label many different types of judicial errors. As was commented in one American case, "The phrase 'miscarriage of justice' has no hard or fast definition".¹³³ Indeed many United States cases go on to say that this phrase

does not merely mean that a guilty man has escaped, or an innocent man has been convicted, but is also applicable where an acquittal or conviction has resulted from a form of trial in which the essential rights of the accused or the people were disregarded.¹³⁴

In Canada, two Criminal Code provisions contemplate miscarriage of justice. Section 686(1)(a)(iii) permits an appeal to be allowed "on any ground there was a miscarriage of justice." One of the few Supreme Court cases on point recently stated:

A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice.¹³⁵

The other provision, s. 686(1)(b)(iii), is curative in nature and appears "to have no application where an appeal against a conviction is based on a miscarriage of justice."¹³⁶ As was noted in Fanjoy, the proviso has a special function.

It is not every error which will result in a miscarriage of justice, the very existence of the proviso to relieve against errors of law which do not cause a miscarriage of justice recognizes that fact.¹³⁷

Judicial comment on the concept has not significantly clarified it. The cases seem "to indicate a basic division within the appellate judiciary itself as to what values are fundamental."¹³⁸

The Federal-Provincial Task Force Report recognized the breadth and inferentially the indeterminacy of the concept of miscarriage of justice. The Report identified the two interpretative possibilities: (i) unjust conviction being able to be found regardless of whether the person did commit the offence or (ii) the label of "unjustly convicted" only attaching to the person who did not commit the offence, where the person was "in fact, innocent".¹³⁹ The Report concluded that compensation should be available only upon proof of innocence: proof that the party did not commit the offence, or that he or she did not commit the acts for which a conviction was entered, or that the acts did not constitute an offence or that the acts charged were not committed. Despite the foreignism of establishing innocence to our system of criminal justice, the authors of the Report thought this alternative appropriate, as the claimant would be seeking compensation and as other similar jurisdictions take a comparable stance.

In the Guidelines the only reference to miscarriage of justice is that the new fact must tend to show that there has been a miscarriage of justice. It is clear from several references that the same position was adopted as was seen in the Report:

... compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty) ...¹⁴⁰

It is also specified in the Guidelines that any pardon or favourable verdict following a ministerial reference or an appeal beyond time limits would have to include a statement that the person did not commit the offence.¹⁴¹ This view of the content of miscarriage of justice should be expanded.

Both documents insist that a distinction be made between two broad types of acquittees: those found not guilty on legal grounds and those who are somehow truly unjustly convicted as they were "in fact, innocent" where the initial verdict has been overturned through sections 690 or 749. These are not categories which are readily distinguishable legally. Indeed, adverting to the meaning given by the judiciary to miscarriage of justice, the distinction seems quite unviable. The compartmentalization present in the Report and Guidelines calls into question the basic meaning attributed to a not guilty verdict, inviting a hierarchy of acquittees. As Lamer, J. noted in *Grdic v. R.*, there are not two different kinds of acquittal in the Canadian system and "To reach behind the acquittal, to qualify it, is, in effect, to introduce the verdict of "not proven", which is not, has never been and should not be part of our law."¹⁴²

It is argued that persons who have been wrongfully convicted and imprisoned are ipso facto victims of a miscarriage of justice and should be entitled to be compensated. To maintain otherwise introduces the third verdict of "not proved" or "still culpable" under the guise of a compensatory scheme, supposedly requiring higher threshold standards than are necessary for a mere acquittal. As Professor MacKinnon forcefully maintains:

... one who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower ... There is a powerful social interest in seeing acquitted persons do no worse than to be restored to the lives they had before they were prosecuted."¹⁴³

The requirement of the Report and Guidelines that the claimant must prove that he or she falls into the special stream of not guilty persons who are truly innocent exacerbates an already unfair situation. The concession that innocence would only have to be demonstrated on a preponderance of evidence does not alleviate the affront otherwise offered to the status of the not guilty.

(ii) A Presumptive Direction for Compensation

Attention has been focussed on the extreme cases, where the state error is uncovered with the aid of extraordinary procedures, because this represents the most universally acceptable stratum for compensatory purposes. The question remains, wherever the boundary line is drawn, as to how to deal with a claim for compensation in a procedural sense. Should the person be forced to prove his or her innocence as the Report and Guidelines mandate or should a more liberal stance be taken?

The often used device of presumptions may serve to provide a viable median in the difficult matter of establishing that compensation should flow. Enough ink has been spilt on defining "presumption". Its use here is intended to be simple.

Whether one calls a presumption a rule of evidence or of reasoning, the result is the same; in the absence of enough evidence the rule, however classified, will dictate the result.¹⁴⁴

The presumption could be twofold: (1) that the person whose conviction is overturned is ipso facto wrongfully convicted or is a victim of a miscarriage of justice (2) this unjustly convicted (and imprisoned) person would be presumptively entitled to compensation upon application. The presumption of a right to compensation would be able to be displaced at a special proceeding convened at the instance of the Crown, wherein the Crown would have to establish that both limbs of the presumption have been shown to be inapplicable on a

preponderance of evidence. If the Crown succeeded in displacing the first part of the presumption, it would be in a position to argue for a reduction or elimination of compensation, but the wrongfully convicted person would then still have the ability to show that he or she ought to receive compensation, on the civil standard, albeit now without the benefit of the presumption.

This formulation has a number of attractions. It helps sustain the presumption of innocence and allows every wrongfully convicted person to continue to benefit from that presumption for compensatory purposes. It avoids the systemic ignominy of requiring a wrongfully convicted person to prove his innocence as is decreed in the Report and is implicit in the Guidelines. It forces the Crown to prove that the twin presumptions of innocence and of a right to compensation should no longer operate and that there should be a partial or full disentanglement. It avoids having to give a hard definition to the notions of wrongful conviction or even more elusively, to miscarriage of justice. It is more consistent with the language of the Covenant to provide an entitlement to compensation ("shall be compensated") which can be removed only upon proof of the inapplicability of the presumptions suggested here. Canada would thus be, if not in the vanguard, at least beyond the stragglers.

On the other hand, it must be recognized that a disentanglement proceeding would explicitly be questioning the plenitude of the accused's innocence. In a sense, the validity of an appellate proceeding or a pardon would be being scrutinized and some issues could be relitigated. Would this be too great a price to pay, given that the suggestion for the presumption and disentanglement formulation arose out of a prediction that some compromise was inevitable? The author is inclined to say that even recognizing the costs the proposal is the most viable alternative.

7. "the person who has suffered punishment as a result of such convictions"

In the recent Report of the Canadian Sentencing Commission, a distinction is made between sentencing ("the judicial determination of a legal sanction to be imposed on a person found guilty of an offence"¹⁴⁵) and punishment ("the imposition of severe deprivation on a person found guilty of wrongdoing ... associated with a certain harshness" and "not to be confused with a mere "slap on the wrist").¹⁴⁶ Although the Commission concedes that all sentencing connotes obligation or coercion, only the more severe forms of coercion are seen as being identical with punishment. The Commission cites "an absolute discharge and, to a lesser degree, a restitution order without any punitive damages"¹⁴⁷ as instances of sentences which do not impose severe enough deprivation to be called punishment. While this author may have preferred an identification of sentencing with punishment and while it could be said that the definitional work of the Commission was influenced by their own ends (to give priority to the notion of obligation over punishment), the conception of punishment promulgated by the Commission is useful for present purposes. It would seem to contemplate punishment as including, for example, a fine, most probation orders and obviously any incarceration. This somewhat restricted definition of punishment is appropriate when examining Canada's responsibilities under the Covenant. The Task Force Report accepts this outlook on punishment and states quite unequivocally:

In our view any compensatory scheme which requires imprisonment as a prerequisite for compensation would likely fail to satisfy Canada's obligation under the International Covenant.¹⁴⁸

It is most regrettable, therefore, that without any explanation the Guidelines specify in Section B(1) that "The wrongful conviction must have resulted in imprisonment, all or part of which has been served." A broader interpretation should be given to the phrase than Canada now finds acceptable.

If the reservation is cost, then one may observe that the actual incidence of claims may be quite low. Further, other techniques could be used to hold down expenditures, such as statutory maxima for certain types of punishments or costs associated with the conviction and release.¹⁴⁹

8. "shall be compensated according to law"

To ensure that compensation will be paid in appropriate cases and given the obligations imposed by Section 2 of the Covenant the status quo without a legislative foundation is unacceptable. In addition, scrutiny of some of the discussions in the United Nations which led to the promulgation of Article 14(6) of the Covenant demonstrates that the parties clearly intended that legislation should be adopted. In rejecting ex gratia payments, the Task Force Report reflected these principles: the wrongfully convicted person "... should be entitled by legislation to make a claim for redress against the state, as of right"¹⁵⁰ [emphasis added]. Again, the Guidelines are disconcerting and to some degree sustain the undesirable features of the present ex gratia regime.

Basically, they provide that when a person meets the eligibility criteria, the appropriate Minister responsible for criminal justice "will undertake to have appointed a judicial or administrative inquiry to examine the matter of compensation".¹⁵¹ The relevant government "would undertake to act on the report submitted by the Commission of Inquiry".¹⁵² Would this procedure be sufficient to satisfy Canada's obligations under the Covenant and particularly Articles 14(6) and 2? / The short answer is that the Guidelines are probably inadequate.

Firstly, it should be noted that the Canadian Guidelines are very similar to the former and current regime in the United Kingdom. In 1985, proposals for a statutory scheme of compensation were rejected and a modified ex gratia program was introduced in the form of a Ministerial statement in Parliament.¹⁵³ It provided that in some cases of wrongful imprisonment compensation would be

payable. The Minister would be bound by the decision of an independent assessor concerning quantum. The scheme was said by the Government to meet international obligations in spirit and purpose, but was not so viewed by commentators:

... the revised scheme clearly fails to meet the U.K.'s international obligations.¹⁵⁴

In the Criminal Justice Act, 1988,¹⁵⁵ the British government ostensibly "put on a statutory basis the payment of compensation for miscarriages of justice."¹⁵⁶

The new procedure requires a determination of eligibility by the Secretary of State and again provides for an assessor to determine the amount of an eligible claim. Again, the response by Justice has been unenthusiastic:

We also welcomed the Government's change of mind in agreeing to introduce a statutory scheme...However, the details of the scheme were disappointing. It would only extend to convictions overturned after an appeal out of time, or after a reference back to the Court of Appeal...The present ex gratia scheme would continue to be used for all other kinds of miscarriages of justice which qualify for compensation...The continued existence of two schemes seems to us to be illogical and unsatisfactory and we will continue to press for a change.¹⁵⁷

As was discussed, the Canadian Guidelines are subject to many of the same criticisms levelled against the British position on the issue of whether compensation is payable thereunder "according to law". There is no statutory base (which at least the British have come recently, if half-heartedly, to accept) and there are still broad discretionary powers at all levels of the scheme. Even assuming the eligibility criteria are satisfied and an inquiry states that compensation should be paid, under the Guidelines the relevant level of government/would have only undertaken "to act on the report". Thereby the government implicitly preserves some right if not to reject the recommendation, at least to interpret it in a manner contrary to the claimant's interest. There may be some expanded right of judicial review in Canada compared to the United Kingdom, but this does not alter the fundamental character of the Guidelines. They do not create an obligation with the force and predictability of an

appropriate statute.

9. The Payment of Compensation: Forum and Quantum

(a) Forum

In a previous section the questions of which entity should make the determination that a person should have his or her conviction reversed or that there should be a pardon were discussed. It was suggested that an Imprisonment Compensation Board might be the appropriate forum for such determinations. Additional research should be undertaken particularly on the relevance of the jurisprudence related to s.96 of the Constitution Act 1867 and the more practical concerns of intergovernmental relations. However, even assuming that the basic decisions have been taken with regard to the qualifying conditions for compensation, the question remains as to who should make the final decision on the amount to be paid on the claim?

The Task Force Report reviewed¹⁵⁸ three basic alternatives without directly advocating a specific choice: the civil courts, a special board or tribunal and the Court of Appeal which also may have considered a reference case. The existing courts were seen as having the advantages of experience in damage awards and incurring little or no costs. The boards or tribunals were viewed as being familiar devices to governments, although perhaps having been too frequently resorted to. The Courts of Appeal were noted as possibly objecting to having such an original jurisdiction and being inappropriate where there has been a pardon as opposed to a decision by a court.

In Section C (Procedure) of the Guidelines a somewhat elastic position is adopted:

When an individual meets the eligibility criteria, the Provincial or Federal Minister Responsible for Criminal Justice will undertake to have appointed, either a judicial or

administrative inquiry to examine the manner of compensation in accordance with the considerations set out below.

[Emphasis added]

The Guidelines do not provide any further explanation of what is intended by this section. They would appear to preclude using the regular civil courts or the Courts of Appeal, if not their judicial personnel. On the other hand it is apparent that the Guidelines do not envisage the establishment of a permanent board or tribunal and rely instead on ad hoc inquiries.

In the United Kingdom, a similar approach has been taken, criticized and then reaffirmed by the Government. There, the position of the wrongfully convicted person seeking compensation has been the subject of several Explanatory Notes,¹⁵⁹ Parliamentary statements,¹⁶⁰ and finally legislation,¹⁶¹ the net result of which leaves the decision on eligibility with the Secretary of State, albeit latterly with compensation being assessed by an assessor appointed by the Minister. Over the years the whole framework for treating such cases has been the subject of trenchant criticism by organizations and, independent observers¹⁶² and even Parliamentary Committees,¹⁶³ but to no avail, as the traditional approach was upheld.¹⁶⁴ It is regrettable that Canada has chosen a path which to many has been discredited in the United Kingdom.

In proposing the creation of an Imprisonment Compensation Board, one is mindful of the questions concerning the breadth of interests which should be protected and be the subject of compensation by the state. It is consistent with the focus herein that the Board be mainly concerned with those who have been imprisoned. However, the jurisdiction of the Board could readily be expanded if the decision were made to compensate a wider range of claimants.

The reasons for using an independent tribunal for the assessment of damages are not dissimilar to those which might have been cited in the creation of similar entities in other contexts. An extensive debate should be commenced on

the rationale for the utilization of a tribunal in Canada, although it is not proposed to explore these controversies now.¹⁶⁵ Briefly, the argument would hold that decisions on compensation ought not to be left with a legislative body. Such questions are too fact-specific and may be peculiarly subject to political sensitivities, which might prejudice a claim. Having set broad principles in legislation, the job of interpretation in individual cases should be delegated. Flexibility should be maintained in the assessment of applications, which a tribunal may exhibit more readily than a superior court or legislature. A specialized tribunal would at least have the prospect of being innovative or even experimental in its decisions on the entitlement of victims of miscarriage of justice. Finally, speed in handling claims should be the hallmark of any structure set up to deal with this kind of problem.

Some type of review should be available to both the claimant and the state, although it should not be of a ministerial character. Rather, the legislation should provide for a mechanism for errors of fact and law to be re-examined, perhaps by another parallel panel of assessors or more obviously by an appellate branch of the tribunal. Judicial review for jurisdictional error, abuse of discretion or breach of natural justice should not be precluded. Experience in other realms might illuminate an appropriate hierarchy of decision makers. In these recommendations on reviewability, the Task Force Report mainly concurred, adding that the "final decision on compensation (presumably following appellate review) would be binding on the Crown who had initiated the prosecution."¹⁶⁶

As usual, in Canada there are delicate questions relating to division of powers issues which must be kept in mind in any recommendation. Article 50 of the Covenant¹⁶⁷ and an overriding concern with the purposes of Article 14(6) suggest that such matters ought not to obstruct a workable mechanism for compensating the wrongfully convicted. The Task Force Report suggests

dovetailing legislation¹⁶⁸ as a way of avoiding any impasse. Given that the Guidelines were adopted by Federal and Provincial Ministers responsible for criminal justice, there would seem to be a sufficiently strong consensus already that joint legislative action is not an unreasonable expectation.

(b) Quantum

The Report and Guidelines provide a framework within which to consider issues pertaining to the quantum of compensation. However, before commencing any analytical chores and as a type of invocation, a few extracts from Thomas provide some sense of spirit and purpose.

This Commission is privileged to have been given the task of righting wrongs done to Thomas, by exposing the injustice done to him by manufactured evidence. We cannot erase the wrong verdicts or allow the dismissed appeals.¹⁶⁹

His [Mr Thomas'] courage and that of a few very dedicated men and women who believed in the cause of justice has exposed the wrongs that were done. They can never be put right.¹⁷⁰

Finally, aptly reiterated at this juncture is the keynote sentence for the Thomas Report:

Common decency and the conscience of society at large demand that Mr. Thomas be generously compensated.¹⁷¹

(i) Limiting Factors

The Guidelines specify in Section D(2) that assessments are to take into account "Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction." and "Due diligence on the part of the claimant in pursuing his remedies." It has been noted that the Guidelines are progressive in the sense that they remove the disentitlement specified in the Covenant if non-disclosure of the unknown fact is attributable to the accused. However the Guidelines tend to expand the range of conduct for which the claimant may be held responsible by the reference to "other acts..." It is surely objectionable if wrongfully convicted persons are to be further penalized for

what many people would say instead are serious systemic failures.

Although no explanation is given in the Guidelines for the insertion of the due diligence clause, it is apparently derived from a discussion in the Task Force Report. There, a statutory limitation period for filing claims was counterposed to a due diligence test as a prerequisite to the granting of an award. The former device was seen as being "imposed for reliability purposes or simply to prevent stale claims."¹⁷² The latter was posited as providing greater flexibility while still protecting "the Crown against stale claims which might be difficult to rebut due to the passage of time."¹⁷³ It is laudable indeed that the Report and Guidelines reject the limitation period. In the Report one finds adequate refutation of this technique of controlling the pool of claimants, when it is said that retroactive applications should be permitted:

Fairness would suggest that anyone who was wrongfully convicted should be able to obtain redress, regardless of when convicted.¹⁷⁴

What is puzzling is why this same liberal spirit did not continue to be in the foreground? The due diligence requirement is said to be less restrictive but it is no more appropriate when dealing with wrongful convictions. One cannot say what is demanded from the Report itself, but in considering the plight of the wrongfully convicted person should not be forgotten. Being incarcerated or recently released does not enhance one's credibility nor does it facilitate access to legal services to assist in gathering evidence in pursuit of a remedy. Indeed imprisonment may well break one's spirit, excising clumsily both insight and determination. Even if the wrongfully convicted person were able to overcome all of these barriers, what remedy would the mythical cool, rational, determined and financially able person pursue anyway? Surely the social context of the victim of a miscarriage of justice militates against the imposition of the due diligence requirement. The Crown does not need protection, as the Report urges

and the Guidelines mandate. Paraphrasing the Report, fairness suggests that anyone who was wrongfully convicted should be able to obtain redress, regardless of the argument that he or she let a potential remedy go unpursued or looked for it in a dilatory fashion.

(ii) Non-pecuniary losses

Conventional portrayals of this category of damages usually include a list of headings as do the Report and Guidelines in Section D(1):

- (a) loss of liberty and the physical and mental harshness and indignities of incarceration;
- (b) loss of reputation which would take into account a consideration of any previous criminal record;
- (c) loss or interruption of family or other personal relationships.

Other than for its brevity, this list is not seriously objectionable, although it does seem somewhat gratuitous to dictate that the assessment would take into account any previous criminal record. A more thorough and tailored set of headings might include:

- (i) loss of liberty. This may be particularized in some of the following heads. Indeed some overlap is inevitable.
- (ii) loss of reputation;
- (iii) humiliation and disgrace;
- (iv) pain and suffering;
- (v) loss of enjoyment of life;
- (vi) loss of potential normal experiences, such as starting a family;
- (vii) other foregone developmental experiences, such as education or social learning in the normal workplace;
- (viii) loss of civil rights;
- (ix) loss of social intercourse with friends, neighbours and family;
- (x) physical assaults while in prison by fellow inmates and staff;

- (xi) subjection to prison discipline, including extraordinary punishments imposed legally (the wrongfully convicted person might, understandably, find it harder to accept the prison environment), prison visitation and diet;
- (xii) accepting and adjusting to prison life, knowing that it was all unjustly imposed;
- (xiii) adverse effects on the claimant's future, specifically the prospects of marriage, social status, physical and mental health and social relations generally;
- (xiv) any reasonable third party claims, principally by family, could be paid in trust or directly; for example, the other side of (ix) above is that the family has lost the association of the inmate.

Surely few people need to be told that imprisonment in general has very serious social and psychological effects on the inmate. For the wrongfully convicted person, this harm is heightened, as it is hardly possible for the sane innocent person to accept not only the inevitability but the justice of that which is imposed upon him. For the person who has been subjected to a lengthy term of imprisonment, we approach the worst case scenario. The notion of permanent social disability due to a state wrong begins to crystallize. The longer this distorting experience of prison goes on, the less likely a person can ever be whole again. Especially for the individual imprisoned as a youth, the chances of eventual happy integration into the community must be very slim. Therefore, beyond the factors noted in this section, special levels of compensation need to be considered for this chronic social handicap. The Thomas Royal Commission explicitly recognized this theme.

Quite apart from the various indignities and loss of civil rights associated with his deprivation of liberty, we consider he will for the rest of his life suffer some residual social disabilities attributable to the events of the last 10 years.¹⁷⁵

In light of the foregoing, it is puzzling that the Guidelines in Section D(1) settle upon a ceiling of \$100,000 as compensation for non-pecuniary losses, qualified only by the statement that the damages "should not exceed \$100,000."

[Emphasis added.] The Task Force Report had discussed the possibility of a ceiling, referring to the Andrews v. Grand and Toy Alberta Ltd.¹⁷⁶ case, a 1978 Supreme Court of Canada decision which held that \$100,000 "[s]ave in exceptional circumstances,...should be regarded as an upper limit of non-pecuniary loss in cases of this nature".¹⁷⁷ Surely Andrews should not apply. It was a case which arose out of a dispute between private parties, for personal injury in a traffic accident. Andrews is not an example of the state discharging a moral and legal duty to one of its victims. Even if the case were relevant, other portions of it would tend to assist the argument that there should be no upper limit on non-pecuniary losses for wrongful conviction and imprisonment:

There is no medium of exchange for happiness, There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one.¹⁷⁸

Later in the decision,¹⁷⁹ some reference is made to the social burden of large awards, but these comments should not be a moderating influence in the context of wrongful conviction where presumably the instances requiring very substantial sums will be few in number. Beyond the inapplicability of Andrews, the Report itself provides reasons for such a limit not being imposed:

- wrongful conviction and imprisonment ...is such a serious error that the state, ...should fully compensate the injured party;
- the number of potential claims would appear to be small so that there is no justifiable fear of a drain on the public purse;
- ...imposing a ceiling on the amount of the award would appear to be contrary to the general philosophy of wanting to provide redress for an injured party;
- the state very rarely imposes a limit on the awards available resulting from damage to property. Limiting compensation in the case of unjust convictions could appear as if the state valued property rights to a greater extent than the freedom of its citizens.¹⁸⁰

One should not expect that the ceiling mentioned in the Guidelines will be taken as a genuine upper limit by either a government or board seriously

concerned with making an equitable award in an appropriate case.

(ii) Pecuniary losses

There will be considerable variability here, reflecting in part the person's skills and employability at the time of incarceration. One should still be cautious in assessing compensation. It may be that the wrongfully convicted person's pre-existing marginality contributed to his or her being found guilty and kept in prison. If full compensation is one of the guiding principles, then each claimant should be given the benefit of the doubt on what his or her life would have held out but for the mistaken conviction.

Some headings might include:

- (i) loss of livelihood;
- (ii) loss of employment related benefits, such as pension contributions by employer;
- (iii) loss of future earning ability;
- (iv) loss of property due to incarceration or foregone capital appreciation;

The Guidelines indicate acceptance of the above headings. There is separate provision in Section D(3) for reasonable legal costs incurred by the applicant in obtaining a pardon or acquittal. It would presumably be a reasonable extension to add expenses with respect to the original trial and appeal and the compensation application itself, based on the belief that the wrongfully convicted person ought not to have to pay to defend himself or herself. One might also add that any payment for legal costs ought to be enough to ensure that lawyers are not positively discouraged from taking an interest in such time-consuming and challenging cases. There should be no ceiling, as it should be recognized that the worse the injustice, the more substantial will be the costs. To impose undue restrictions might be seen as penalizing the victim or obstructing his or her eventual vindication.

The Guidelines do not contemplate claims for even pecuniary losses by third parties to the wrongful conviction. A potential compromise between inclusion and exclusion of coverage for these persons could be to provide for pecuniary losses only. This is not ideal if one's aim is to provide full compensation to all the victims of a miscarriage of justice, but this solution would at least be more generous than the Guidelines.

E. Conclusion

This article has attempted to cover many vital issues concerning compensation of the wrongfully convicted. In so doing, it is certainly recognized that there is some danger of the discussion becoming too thinly spread. On the other hand, the present situation in Canada seems to drive one towards a comprehensive effort. Too little has been written on the subjects of who are the wrongfully convicted and how to provide redress for them. Governmental responses are also late and inadequate, compared to the significance of the problem. The main dedication of this article was and remains the plight of those who have been wrongfully convicted and imprisoned. However, it is conceptually awkward and dangerous to the overall integrity of the criminal justice system to try to stop state responsibility at those junctures. Sound arguments can be made to extend compensation to wider ranges of potential claimants. Indeed, immersion in the rationale, international law and fundamental principles of compensation for the wrongfully convicted fairly compels one to support an extension.

In deciding upon the appropriate compensatory regime, there are now at least some base points in Canada. The International Covenant on Civil and Political Rights provides a relevant and authoritative standard upon which to found domestic legislation. Perhaps the Covenant could be more clearly drafted and in some places it is rigid and unsympathetic. None the less, it helps to organize

discussion and it ought to inspire further governmental attention as well. The Federal-Provincial Guidelines provide some assurance that, if nothing else, wrongfully convicted people have been noticed by responsible ministers. In this paper it is hoped that the shortcomings of the Guidelines have been made fairly apparent. A re-evaluation should start at the level of first principle and, having done so, the prospects for liberalization and statutory protections should increase. The present Guidelines are plainly too narrow, rigid and discretionary and nowhere has there been adequate support given for this lamentable policy choice.

As the Covenant and Guidelines are reconsidered, it should always be remembered that any mechanism for redress, "... should be as responsive as possible to the injured party given that he [sic] is the victim of the state's criminal justice system".¹⁸¹ Admittedly, these sentiments were put forth in the Report in support of a smaller range of claimants than the author would pose as appropriate, but the fundamental point of the state dealing with its own victims is succinctly made.

Once one accepts that the state has responsibilities flowing out of the failure of the system and its many actors, then compensation should flow fairly, generously and as of right. The spectre of injustice assumes terrible proportions in the wrongful convictions of people like Donald Marshall, Jr. or Arthur Thomas. The further failure to promptly and adequately compensate such citizens exacerbates the severity and shame of the actions of the state. However, miscarriages at the level of the verdict and subsequently when compensation is considered need not be of these historic proportions to spur governments to act. For every such horrific incident, thousands of other smaller injustices may be regularly perpetrated by the state in the criminal justice system. Compensation should be more readily available for those who have

suffered more superficial wounds at the hands of the state and not merely for those who are the victims of society's worst outrages. The failure to address the position of the wrongfully convicted in a sensitive and principled manner should be a continuing embarrassment to Canada.

ENDNOTES

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1. This two extract and the original chapter title is drawn from Franz Kafka, The Trial, (Vintage Books edition, New York, 1969), at page 7.
2. For a concise introduction to these important protections, see J.C. Morton and S.C. Hutchison, The Presumption of Innocence (Toronto, Carswell, 1987), especially Chapters 1-3.
3. "The Due Process Model resembles a factory that has to devote a substantial part of its input to quality control." Packer, The Limits of the Criminal Sanction (Stanford Univ. Press, 1968) p. 165. This classic study presents typologies of the Due Process and Crime Control Models which, in the former case, highlight systemic characteristics aimed at avoiding error.
4. Every nation has its examples of such judicial horrors. Without attempting to certify that these are the worst cases, one might usefully review: (a) in the United States, Isidore Zimmerman spent 24 years in prison for a murder that he did not commit and was eventually awarded U.S. \$1 million as compensation, less legal fees of \$500,000. See Corrections Digest, June 15, 1983, p. 9; (b) in New Zealand, Arthur A. Thomas served nine years in custody on two charges of murder, which were later the subject of a free pardon, investigation and report by a Royal Commission and the payment of about N.Z. \$1 million as compensation. See the Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas (Government Printer, Wellington, 1980); (c) in the United Kingdom, Timothy John Evans was executed in 1949 for murder. The likely real killer was subsequently convicted and executed for related murders and Evans was pardoned posthumously as a result of an inquiry. See Ludovic Kennedy, Ten Rillington Place (London; Gollancz, 1961) (d) in Canada, Donald Marshall, Junior spent eleven years in penitentiary for a murder which he did not commit and of which he was finally acquitted. Mr. Marshall received compensation of \$270,000, less legal fees of about \$100,000. This wrongful conviction is currently the subject of a Royal Commission. See Michael Harris, Justice Denied: The Law Versus Donald Marshall (Toronto; Macmillan, 1986).
5. "Other jurisdictions go further and also compensate for detention in custody pending final disposal of the case. These include Sweden, Norway, Denmark, Austria, France, West Germany, Holland, Belgium, Hungary and some of the Swiss Cantons." Justice, the British Section of the International Commission of Jurists, Compensation for Wrongful Imprisonment, (London, 1982), p. 24. "The German provisions or the question of compensation are

perhaps widest in their scope, for they encompass not only custody awaiting trial and wrongful conviction but also in some cases arrest, detention in a hospital or asylum, and disqualification from driving." Carolyn Shelbourn, "Compensation for Detention", [1978] Crim. L.R. 22, at p. 25.

6. It should be noted that there are contemporary proposals for compensating accused persons for some of the out of pocket costs associated with some categories of not guilty persons similar to the ones noted above. Included might be counsel fees and disbursements necessary to participate in the proceedings. See, for example, the Law Reform Commission of Saskatchewan, Tentative Proposals for Compensation of Accused on Acquittal, (Saskatoon, 1987). That study encounters many of the same problems faced in this article, particularly on eligibility and entitlement, although their resolution is more restrictive than is discussed herein.
7. Huff, Rattner and Sagarin, "Guilty Until proven Innocent: Wrongful Conviction and Public Policy", 32 *Crime and Delinquency* 518-544 (1986), at p. 523.
8. Justice, the British Section of the International Commission of Jurists, Miscarriages of Justice (London: 1989), at p. 5.
9. The Federal-Provincial Task Force Report was sent to the Deputy Minister of Justice on September 19, 1985. In the letter of transmittal (p.v. of the Report), the Coordinator of the Task Force indicates sentiments not dissimilar to those of the author on the then and current state of Canadian law:

As you know, Canada lacks a proper legislative mechanism for compensating the innocent person who is unjustly convicted and imprisoned. We hope that our Report will bring Canada closer to a resolution of this problem.

The Task Force was composed of the Coordinator (a lawyer with the Federal Department of Justice) and seven other provincial counterparts. Its terms of reference (at pp. 1-2) included: (1) to examine legislation comparatively; (2) to examine the use, effectiveness and shortcomings of such legislation; (3) to examine existing compensatory schemes to see if any could be adapted for this special purpose; and (5) to explore legislative options, costs, and division of powers, among other concerns. In the author's view the 44 page Report is an equivocal document. As shall be seen, it wavers from quite liberal stands on some issues to unnecessarily rigid attitudes on others. On the whole, however, it can be said that it is a pity that more of the policies identified and to some extent advocated in the Report were not finally reflected in the Guidelines which have much less to commend them.

10. Supra, note 4, p. 115, para. 486.
11. Ibid., p. 116, para. 490.
12. Ronald Dworkin, "Principle, policy, procedure", in Tapper, ed., Crime Proof and Punishment: Essays in Memory of Sir Rupert Cross, (Butterworths, London, 1981), p. 207.

13. Ibid., p. 193. It is interesting to note that Finnis, speaking from a contemporary natural law perspective, has also chosen to accord a special prominence to related rights. In Lloyd and Freeman, Lloyd's Introduction to Jurisprudence (5th Ed.), (Toronto, Carswell, 1985) it is emphasized (at pp. 141-142) that Finnis, unlike utilitarians, does believe in some absolute human rights, even if they are not generally recognized in society. Among these rights is the right not to be condemned on knowingly false charges. See J. Finnis, Natural Law and Natural Rights, (Oxford; Clarendon, 1980) esp. p. 225.
14. O'Neil v. Ohio (1984) 83 AP-104 (10th Dist.). The case is also reported at 13 Ohio App. 3d 320 and 13 O.B.R. 398. The full quotation is worthy of repetition, although as only a Westlaw print-out was able to be located, a precise page number cannot be given.

No society has developed a perfect system of criminal justice in which no person is ever treated unfairly. The American system of justice has developed a myriad of safeguards to prevent the type of miscarriage to which the claimant herein was subjected, but it, too, has its imperfections. Fortunately, cases in which courts have unlawfully or erroneously taken a person's freedom by finding him or her guilty of a crime which he or she did not commit are infrequent. But, when such a case is identified, the legislature and the legal system have a responsibility to admit the mistake and diligently attempt to make the person as whole as is possible where the person has been deprived of his freedom and forced to live with criminals. Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime. It is in this context that we review the trial court's judgment and the record in this case.

15. Peter Ashman, "Compensation for Wrongful Imprisonment", New Law Journal, May 23, 1986, 497, at p. 498.
16. Supra, The Thomas Inquiry, footnote 4, at p. 120, para. 514.
17. See Jonathan Caplan, "Compensation for Wrongful Imprisonment", 1983 Public Law 34-36, Spring, 1983, at p. 34.
18. See Keith S. Rosenn, "Compensating the Innocent Accused", 37 Ohio State L.J. 705-726, at p. 726.
19. For a discussion of the gradual acceptance of victims of crime as being appropriate recipients of compensation, see Richard Murphy, "Compensation for Victims of Crime: Trends and Outlooks", Dalhousie L.J. 530-549, esp. pp. 534-536.
20. See Mark Kelman, "Criminal Law: The Origins of Crime and Criminal Violence", in Kairys, ed., The Politics of Law: A Progressive Perspective, (Pantheon, New York, 1982), at pp. 214-229 for a succinct review of the major perspectives on the etiology of crime.

21. The Covenant and Optional Protocol were adopted and opened for signature ratification and accession by United Nations General Assembly (U.N.G.A.) resolution 2200A (XXI) on December 16, 1966. Canada acceded to both instruments in 1976. See International Instruments In The Area of Human Rights To Which Canada Is A Party, prepared by the Human Rights Directorate of the Department of the Secretary of State, December, 1987.
22. Mr. Justice W.S. Tarnopolsky, "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights", (1982) 8 Queen's Law Journal 211-231, at p. 211. See also M. Ann Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications" (1985), 23 Univ. of Western Ontario Law Review 9-20.
23. The process for submission and consideration of complaints may be both complicated and protracted. For an introduction see Tarnopolsky, *ibid.*, footnote 23, at pp. 211-213 and "Brief description of the various stages in the consideration of communications under the Optional Protocol to the International Covenant on Civil and Political Rights", Official Records of the General Assembly, Thirty-Seventh Session, Supplement No. 40 (A/37/40), paras. 397-397.8. Also see M.E. Tardu, Human Rights; The International Petition System (3 Binders), (Oceana Publications, Inc., Dobbs Ferry, N.Y., 1985), esp., "The Communication Procedure Under the Optional Protocol to the United Nations Covenant on Civil and Political Rights", Binder 2. See also, John Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 Supreme Court Law Review, 287-302 and Matthew Lippman, "Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights" (1980), 10 California Western International Law Journal, 450-513.
24. ...international institutions may, at first blush, seem remote from domestic compliance. Involving an international institution means invoking a forum that may be a long way away, presided over by foreigners, with no direct domestic jurisdiction. Yet these institutions, when in place and properly used, can be an important step towards domestic compliance."
- David Matas, "Domestic Implementation of International Human Rights Agreements," [vol./date] Canadian Human Rights Yearbook, 91-117, at 103.
25. It is possible that mere inaction might be argued to be neutral in effect, but for Articles using mandatory or prohibitory language this appears to be an untenable position, as it involves a contravention of a standard of the Covenant. See Tarnopolsky, *supra*, footnote 23, at p. 212 and 231 and the discussion of Article 14(6), *infra*.
26. Alan Brudner, "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework" (1985), 35 University of Toronto Law Journal, 219-254, at p. 219.
27. *Ibid.*, at 254. See also, Donald F. Woloshyn, "To What Extent Can Canadian Courts Be Expected to Enforce International Human Rights Law in Civil Litigation?" (1985-86), 50 Saskatchewan Law Review 1-11.

28. Official Records of the General Assembly, Thirty-Fifth Session, Supplement No. 40 (A/35/40) para. 166.
29. Official Records of the General Assembly, Thirty-Ninth Session, Supplement No. 40 (A/39/40) para. 18, p. 146.
30. Official Records of the General Assembly, Fortieth Session, Supplement No. 40 (A/40/40), para. 206, p. 37.
31. Official Records of the General Assembly, 40th Session, Supplement No. 40 (A/40/40) para. 238, at p. 43.
32. Ibid., para. 193 at p. 34. Canada's request was acceded to by the Human Rights Committee and was to be submitted on April 8, 1988. See ibid., para. 17 at p. 146.
33. Official Records of the General Assembly, Forty-Third Session, Supplement No. 40 (A/43/40), p. 176. The simple notation was that the report was "Not Yet Received." In a letter from the Department of the Secretary of State, dated June 5, 1989, the author was advised that the report should be submitted by September, 1989.
34. John Humphrey, "The Canadian Charter of Rights and Freedoms and International Law" (1985-86), 50 Saskatchewan Law Review, 13-19, at p. 17.
35. There is ample support for these assertions in the small body of scholarly writing on the subject. "It would seem that a state with such already existent resources, and one which has taken serious steps to address itself to such concerns as crime victims 'reparation' awards, could allow itself the luxury of compensating an individual who has turned out to be no less a victim of the criminal justice system than the person who brought the initial charge ... In view of the less than numerable cases of wrongful incarceration of innocent individuals in Ohio, the burdens on the state seem to be at best, minimal." Hope Dene, "Wrongful Incarceration in Ohio: Should There Be More Than A Moral Obligation to Compensate?", 12 Capital University Law Review 255-269, at p. 265. See also, in the same vein, Shelbourn, supra, footnote 5, at pp. 29-39 or Rosenn, supra, footnote 19, at pp. 725-726. On the other hand, some observers are somewhat more uncertain about the costs issue. Professor Peter MacKinnon writes that the expense of a program of compensating all acquitted persons for their costs could be prohibitive or "Perhaps it would be, but we don't know because the proposal has never been costed." See "Costs and Compensation for the Innocent Accused," 67 The Canadian Bar Review (1988), 489-505, at 500.
36. These kinds of arguments were advanced by Ontario in 1983 concerning the prospect of statutorily protected rights of compensation:

Grave reservations were expressed by the Province of Ontario about institutionalizing such compensation if the net effect would be to:

- 1) confuse the processes of the criminal law and civil law;

- 2) make the criminal prosecutions more difficult; and
- 3) result in greater compensation to wealthy people thereby lessening the liability of the state to poor accused persons.

"Supplementary Report of Canada on the Application of the Provisions of the International Covenant on Civil and Political Rights in Response to Questions Posed by the Human Rights Committee in March 1980", Department of the Secretary of State, March 1983, at p. 39.

37. Supra, note 7, at p. 540.
38. Shelbourn, supra, footnote 5, at p. 30.
39. See, for example, Shelbourne, supra, footnote 5 at p. 22, "In practical terms the only real relief which an ex-accused can hope to receive is an ex gratia payment from government." A lead editorial in the New Law Journal, concurring with the 1982 Justice report on the issue (supra, footnote 5) maintained that "this provision is inadequate". "Compensation for Imprisonment", 132 New L.J. 733 (August 5, 1982). By 1986, the outlook in Britain was no better. "The present scheme has been through none of those procedures, statutory or customary by which words or deeds become recognized in our society as law ... that sentiment [that miscarriage of justice is one of the gravest matters which a civilised society can consider] does not appear to be shared by the Home Office." Ashman, supra, note 15.
40. For example, in Ohio, where a claimant may seek to have the legislature waive its immunity through a special bill, which permits the state to be sued, Hope Dene recently condemned the status quo:

In view of the obstacles placed in the convicted innocent's path, it seems fair to point out that no genuine remedy exists for him.... Ohio has no qualms about permitting suits against it for common torts, but for bizarre and unfounded criminal injustices, the state regresses to an imperium which evades responsibility for its mistakes.

Supra, footnote 35, at 264.

Rosenn's reaction to the overall American position is typical:

The United States has lagged far behind many nations in its failure to compensate the innocent victims of erroneous criminal accusations.

Supra, footnote 18, at p. 705.

One state has recently introduced a special statutory scheme which has attracted some favourable comment. The New York State Legislature had the collective humility to admit the weakness of its previous legal regime:

The legislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently

imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages.

The Unjust Conviction and Imprisonment Act of 1984, Section 1 of L. 1984, c. 1109, eff. Dec. 21, 1984. Quaere, will Canada ever see such a frank preamble? For comment, largely favourable, on the New York statute, see David Kasdan, "A Uniform Approach to New York State Liability for Wrongful Imprisonment: A Statutory Model", 49 Albany L.R. 201-243.

41. See the Home Office Letter to Claimants, Appendix C, the Justice Report (1982), supra, footnote 5, at pp. 31-32 and the November 29, 1985 statement to the British House of Commons, in the form of a written reply (No. 173) to a question by Tim Smith, M.P. Being in the nature of a Ministerial statement, there are still considerable weaknesses to this approach, beyond its ex gratia character: review by the courts or Parliament seems more or less precluded and it can be changed without leave having to be received from any person or institution. These and other problems are discussed infra at pp. 59-60 in light of more recent British developments which attempt to combine a legislative approach with vestiges of the old ex gratia scheme.
42. The Attorney General of Manitoba tabled draft Guidelines in the Legislature on July 8, 1986. In the main, they mirror the Federal-Provincial Guidelines which were introduced almost two years later. The major differences appear in the Manitoba Guidelines making explicit reference to the International Covenant on Civil and Political Rights in the "Background" section and in their indicating that compensation should be available for provincial offences as well. It is reasonable to assume that the Manitoba Guidelines still obtain in that Province, despite Manitoba having apparently acceded to the Federal-Provincial Guidelines. This assumption is based upon the two sets of guidelines being so similar anyway. Further, there is not likely to be any objection by other provinces to Manitoba retaining its more generous eligibility criteria in admitting provincial offences.
43. A letter requesting an update of the 1983 statements was sent by the author to the Minister of Justice, Mr. Herbert Marx. The reply, dated June 6, 1988, contained the following information:

Unfortunately, we cannot give you any further follow-up since the studies already done on this subject are at preliminary stages and, because they are being used as working documents, they must remain confidential.

In June 1989, the author sent a questionnaire to all the relevant Federal and Provincial Ministers which asked for information on pre- and post-Guidelines experience on compensation for wrongful conviction. Replies were received from British Columbia, Alberta, New Brunswick, Newfoundland, Saskatchewan, Nova Scotia, Manitoba and the Northwest Territories, and the Government of Canada. No respondent indicated that legislation had been introduced. Some provinces referred to additional measures which had been

taken to make the Guidelines effective in the jurisdiction, either by way of adoption by resolution of the legislature (e.g. New Brunswick), a ministerial statement (e.g. New Brunswick) or the establishment of a permanent or ad hoc inquiry (e.g. Alberta). Some respondents indicated that no steps had been taken since the Guidelines were agreed upon (Newfoundland and Labrador and Nova Scotia). Two governments noted that a final Memorandum of Agreement between the Province and the Government of Canada would be prepared (New Brunswick and Saskatchewan). The Federal government noted that it had "initiated discussions with the provinces with a view to reaching cost-sharing agreements with them...", which is presumably what was referred to in the New Brunswick and Saskatchewan references.

44. Dean C.A. Wright, in his essay "The Adequacy of the Law of Torts", Linden, ed., Studies in Canadian Tort Law, (Butterworths, Toronto, 1968), pp. 579-600, at p. 584, obviously took the same position on the limitations of the law of tort. "The present problems of tort are not so much matters of law or internal consistency as sociological, depending on what we want to achieve and at whose expense."
45. David Cohen and J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986), 64 The Canadian Bar Review 1-57, at p. 5.
46. Ibid., at p. 12.
47. The Home Affairs Committee of the House of Commons of the United Kingdom held special sittings with respect to Miscarriages of Justice, eventually comprising its Sixth Report of the 1981-82 Session. In the Minutes of Evidence, on June 23, 1982 at p. 26, an exchange took place between Mr. Dubs, an M.P. and Mr. A.J.E. Brennan, Deputy Under Secretary, which in the British context highlights the lack of utility of pursuing a conventional civil action over a special stream of remedy:

(Mr. Dubs) 88. In your memorandum you mention the possibility of civil action as well as the possibility of ex gratia payments ... if one is asked to advise somebody which to do, what ought the advice to be?

(Mr. Brennan) ...I suppose if it was clear that an ex gratia payment of a substantial sum could be obtained from the Home Office that might well be seen as a better way of proceeding than the expensive and tortuous process of litigation ...
[emphasis added]

48. See ss. 25 and 783, the Criminal Code, R.S.C. 1985, Chapter C-46, the Proceedings Against the Crown Act, R.S.N.S. 1967, Chapter 239, ss. 2(2)(e), 4(2) and 4(6), and the Liberty of the Subject Act, R.S.N.S., 1967, c. 164, s. 12. In Nelles v. Ontario, S.C.C., August 14, 1989, unreported, Lamer, J., for the Court, concluded that a section in the Ontario Proceedings Against the Crown Act (similar to s. 4(6) of the Nova Scotian counterpart) ensured that the "Crown is rendered immune from liability", but observed that "the constitutionality of s. 5(6) of the Act is still an open question". Other bases for claims of immunity have been weakened or eliminated by Nelles. See infra, pp. 18-19.

49. W.V.H. Rogers, Winfield and Tolowicz on Tort (Twelfth Edition), (London: Sweet and Maxwell, 1984), p. 58.
50. John G. Fleming, The Law of Torts (Sixth Edition), (Agincourt, Ontario: Carswell/The Law Book Co. Ltd., 1983), p. 26.
51. Allen M. Linden, Canadian Tort Law (Third Edition) (Toronto: Butterworths, 1982), p. 44.
52. "Once a judicial act interposes, liability for false imprisonment ceases." See Street, ibid., at p. 27. Similarly, according to Rogers, supra, footnote 49, at p. 66, "There can, however, be no false imprisonment if a discretion is interposed between the defendant's act and the plaintiff's detention."
53. See the definition of warrant in s. 493 of The Criminal Code, R.S.C. 1985, Chap. C-46 and also s. 511, where in the description the contents of the warrant to arrest, it is said that the accused shall be "brought before the judge or justice who issued the warrant". (Emphasis added)
54. See Kasdan, supra, footnote 40, at p. 211.
55. See Rogers, supra, footnote 49, at p. 552.
56. This list is an amalgam of Rogers, ibid., at p. 553 and Fleming, supra, footnote 50, at pp. 576-577, but these prerequisites appear to be generally accepted.
57. See Fleming, ibid., at p. 576.
58. Supra, footnote 49, at pp. 551-552. Some American commentators are even more forceful. "Thus, it is impossible for a victim of wrongful imprisonment arrested pursuant to valid judicial process to establish a prima facie case of malicious prosecution." See Kasdan, supra, footnote 40, at p. 214.

Lamer, J., in Nelles, supra, note 48, not only acknowledges the difficulties, "... a plaintiff bringing a claim for malicious prosecution has no easy task", but later seems to welcome them for their inhibiting effects, countering "this "flood-gates" argument": "... there exist built-in deterrents on bringing a claim for malicious prosecution ... the burden on the plaintiff, is onerous and strict".
59. Supra, note 48.
60. Ibid.
61. See Bux v. Slough Metals Ltd., [1973] 1 W.W.R. 1358 (C.A. Civil Div.) and Kamloops v. Nielsen, [1984] 5 W.W.R. 1 (S.C.C.).
62. The Police Act, S.N.S., 1974, c. 9, s. 1, ss. 11(4). (See also the statutory counterparts in other provinces and federally.)

63. These elements are summarized in R.A. Percy, Charlesworth on Negligence (Seventh Edition), (London: Sweet and Maxwell, 1983), p. 14, para. I - 19.
64. Blyth v. Birmingham Waterworks (1856), 11 Ex. 781, at 784.
65. Morris v. West Hartlepool Steam Navigation Co. Ltd., [1956] A.C. 552, at p. 524 (H.L.).
66. See Charlesworth, supra, footnote 63 at pp. 150-152.
67. Ibid., pp. 231-2.
68. Supra, footnote 61, at p. 16.
69. In David Jones and Anne S. de Villars, Principles of Administrative Law, (Carswell, 1985) at p. 388, the authors note that ultra vires actions might remove the usual immunity. Nelles, supra, note 48, per McIntyre, J., highlights the Crown's immunity for the judicial function of prosecution, although the Attorney General or Crown Attorney may still be held accountable.
70. Supra, note 48, per Lamer, J.
71. See Tarnapolsky and Hayward, supra, note 22; Claydon, supra, note 23, and Humphrey, supra, note 34.
72. In a publication obtained from the Department of the Secretary of State, Implementation of the International Covenant on Civil and Political Rights by the Constitution Act, 1982, a type of table of concordance is presented with three headings at the top of each page: Right, Covenant and Charter. No corresponding Charter reference is noted for Article 14(6) of the Covenant.
73. Supra, Tarnapolsky, note 22, at pp. 218-219.
74. (1987), 38 D.L.R. (4th) 161, at 185 (S.C.C.). Also reported at (1987), 74 N.R. 99 at 171-172 and (1987), 51 Alta. L.R. (2d) 97 at 124.
75. Several cases have clearly indicated that damages may be recovered under section 24(1). See Banks et al. v. The Queen (1983), 83 D.R.S. 33, 965 (F.C.C., T.D.); R. v. Esaw (1983), 4 C.C.C. (3d) 530, at 536 (Man. C.A.); Crossman v. The Queen (1984), 12 C.C.C. 547, at pp. 558-559 (F.C.C., T.D.); Vespoli et al. v. M.N.R. (1984), 55 N.R. 269, at 272 (F.C.A.); R. v. Germain (1984), 53 A.R. 264, at pp. 274-275 (Q.B.); Scorpio Rising Software Inc. et al. v. A.G. Saskatchewan et al. (1986), 46 Sask. R. 230, at 235 (Q.B.).
76. For example, see Dale Gibson, The Law of the Charter: General Principles (Carswell: 1986), at pp. 211-212; Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 Canadian Bar Review 517-576; Ken Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy", (1988), 52(1) Saskatchewan Law Review 1-87, who at p. 3 observes: There appears no doubt that a damage award in some form will be available as a remedy for infringement or denial of constitutional guarantees under the Canadian Charter...

77. Supra, note 9, at p. 26.
78. Ibid.
79. Supra, the Thomas Commission, note 4, at p. 113.
80. 584 H.C. Deb. C.C. 32147. With the passage of the Criminal Justice Act 1988 (1988 c. 33), significant changes were made in the British position. In particular, s. 133 provides for a statutory framework for compensation for miscarriages of justice, although under s. 133(3) "The question of whether there is a right to compensation under this section shall be determined by the Secretary of State." This amendment is addressed more fully at p. 55.
81. Supra, note 41.
82. In R. v. Secretary of State for the Home Office ex p. Chubb, [1986] Crim. L.R. 809 (Q.B.), the court held that the Secretary of State in respect of ex gratia payments was not subject to the review of the courts and had complete discretion, although Maggy Pigott, Barrister, commented in the same report that some review would potentially be available "on the basis of abuse of discretion".
83. See Dene, "Wrongful Incarceration in Ohio ...", supra, note 35, at p. 260.
84. Supra, note 40, at p. 216.
85. Ibid., at pp. 218-219.
86. See the Report of the Seventh Session of the Commission on Human Rights, 16 April-19 May 1951, Economic and Social Council, Official Records: Thirteenth Session, Supplement No. 9, Annex 1, Draft International Covenant on Human Rights, Article 10(3), page 22 and also see the Report of the Eighth Session of the Commission on Human Rights, 14 April-14 June 1952, Economic and Social Council, Official Records: Fourteenth Session, Supplement No. 4, para. 220, page 32.
87. Report of the Eighth Session of the Commission on Human rights, Ibid., para. 221. The vote to reconsider was 8 in favour, 8 against and 1 abstention.
88. As the delegate from Ceylon observed
- ...it should be made clear whether the phrase "the person who has suffered punishment" meant only the person who had been convicted or whether it might in some cases apply to his dependents.
- United Nations, General Assembly, Fourteenth Session, Official Records, Third Committee, 963rd. Meeting, 20 November 1959, para 7 at page 268.
89. Supra, note 9, at p. 18.
90. Supra, note 5, at p. 20.
91. Supra, note 4, at p. 119.

92. See Appendix A, Section B(2).
93. Supra, note 9, at p. 19.
94. Ibid.
95. Report of the Fifth Session of the Commission on Human Rights, 9 May - 20 June 1949, Economic and Social Council, Official Records: Fourth Year, Ninth Session, Supplement No. 10., Annex 1, Draft International Covenant on Human Rights, Article 13 (3), page 20.
96. Supra, note 86, para. 218, of the 1952 Report.
97. Official Records of the General Assembly, 14th Session, 15 Sept.-13 Dec., 1959, Annexes, Agenda Item 34, para. 62., p. 12.
98. Supra, note 88, 969th meeting, 27 November 1959, para. 20, p. 294.
99. Commentary on Article 1(a), Explanatory Report of the European Convention on the International Validity of Criminal Judgments, Publication of the Council of Europe, 1970, p. 22.
100. Supra, note 5, at p. 22.
101. These sentiments were forcefully expressed in some of the original debates, first by France:
- There was no reason why the same right should not be granted to a person who had been convicted although innocent; such a person had suffered far more serious material and moral injury. Supra, note 88, 964th meeting, 23 November 1959, para. 24 at page 273 Morocco later advanced the same position,
- Ibid., 967th meeting, 25 November 1959, para. 17, at p. 286.
102. See Ritchie, J., in Queen v. Pierce Fisheries, [1970] 5 C.C.C. 193, at p. 199, 12 D.L.R. (3d) 591, at p. 597.
103. See Dickson, J. in R. v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353, at 374-375 or [1978] 2 S.C.R. 1299, at 1327. Not all federal statutes which specify a penalty including the prospect of imprisonment are clearly criminal in nature. For example, consider the Migratory Birds Convention Act, R.S., c. 179, s. 1, which includes in s. 12 a general penalty provision where a fine or up to six months imprisonment or both can be levied. The Territorial Lands Act, R.S., c. 263, s. 1, in s. 17 provides for similar penalties for trespassing on territorial lands after having been ordered to vacate.
104. Supra, note 9, at p. 20.
105. Ibid.
106. Ibid.

107. See Appendix A, Section B(3).
108. Supra, note 93, para. 218, p. 32.
109. Ibid., para. 219, p. 32.
110. See ss. 838 and 678 which basically provide for extending the usual time period reasons.
111. Supra, note 9, at p. 21.
112. See Wilson v. Minister of Justice (1985), 20 C.C.C. (3d) 206, 46 C.R. (3d) 91 (Fed. C.A.), leave to appeal to S.C.C. refused 62 N.R. 394.
113. William F. Duker, "The President's Power to Pardon: A Constitutional History" (1977), 18 William and Mary Law Review 475-538, at p. 476.
114. National Parole Board, Briefing Book For Members of the Standing Committee on Justice and Solicitor General, Volume 1, (November, 1987), p. 64.
115. In its Report for the fiscal 1982-83 year, the National Parole Board noted, at p. 49, that pardons were granted in 14 cases and 7 applications were denied. In 1983-84, the Board cited 17 pardons and 10 denials, at p. 48. Of course, the Royal Prerogative is to be distinguished from the statutory pardon under the Criminal Records Act, which is used with far greater frequency (275 pardons granted in 1983-84, according to the Parole Board Report) and which does not relate to the issue of whether the conviction was wrongful.
116. A.T.H. Smith, "The Prerogative of Mercy, The Power of Pardon and Criminal Justice" 1983, Public Law 398-439, at p. 398. See also William C. Hodge, "The Prerogative of Pardon" 1980, New Zealand Law Journal 163-168.
117. Supra, note 116, Smith, at p. 399.
118. Ibid.
119. Supra, note 116, Hodge, at p. 163.
120. See supra, note 113, at pp. 535-538. Also, Leonard B. Boudin, "Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?" 48 University of Colorado Law Review, 1-39, (1976-77).
121. Supra, note 114, at p. 66.
122. Supra note 116, Smith, at p. 428.
123. The Task Force Report, supra, note 9, at p. 43 provides the following caution:

There would appear to be very serious constitutional difficulties in having a tribunal, board or designated person determine the question of innocence in respect of a criminal

conviction if they are not already superior, district or county court judges. The determination of innocence is inexorably tied up with section 96 of the Constitution Act, 1867. The function of determining guilt (and by extension innocence) was performed at the time of confederation by country, district or superior court judges. Since McEvoy v. Attorney General of New Brunswick (1983), 1 S.C.R. 709, section 96 is known to bar alterations to the constitutional scheme envisaged by the judicature sections of the Constitution Act, 1867.

Justice, in its 1989 Report, Miscarriages of Justice, *supra*, note 8 at p. 69, makes a similar suggestion for the establishment of an independent review body, which would have powers to "advise the Home Secretary either not to intervene or to invoke the Royal Prerogative in order to remit the sentence or to set aside the conviction." Justice circumvented the problem of the body being an alternative Court of Appeal by recommending (at p. 71) that it not have a power to quash a conviction or alter a sentence, but only to "establish the truth in a case and to advise the Secretary of State accordingly." This conceptualization of the tribunal might obviate some federal-provincial difficulties.

124. Supra note 9, at p. 22.
125. Supra, note 7, Huff et al., p. 531.
126. Supra, note 95.
127. Supra, note 9, at p. 30.
128. Supra, note 86, at para. 218, p. 32 of the 1952 Session.
129. Ibid, para. 219, p. 32.
130. Supra, footnote 127.
131. Supra, note 9, at p. 22.
132. The Task Force Report, at p. 22, refers to the element of miscarriage of justice as being "considerably more complex" and "the source of considerable concern and discussion".
133. People v. Geibel, 208 P. 2d 743, at 762, 93 Cal. App. 2d. 146.
134. People v. Wilson, 138 P. 971, 975, 23 Cal. App. 513.
135. Fanjoy v. The Queen, (1985) 21 C.C.C. (3d) 312, at p. 318, per McIntyre, J.
136. R. v. Hayes, (1985) 67 N.S.R. (2d) 234, at p. 236.
137. Supra, note 135.
138. "...the apparent degree of inconsistency [in the application of the proviso] is cause for concern. It invites, if not cynicism, then at least wry parody of a kind indicated in the following question put to a Court of Appeal judge

at a lawyer's workshop: "What is the greatest miscarriage of justice in an appeal that your Lordship has ever dismissed under the 'no substantial miscarriage of justice' proviso?" See Ronald R. Price and Paula W. Mallea, "Not by Words Alone: Criminal Appeals and the No Substantial Miscarriage of Justice Rule", in Del Bueno, ed., Criminal Procedure in Canada, (Butterworths: Toronto, 1982) pp. 453-497, at p. 494.

139. Supra, note 9, at p. 22.
140. See Appendix A, Section B(5), p. 2.
141. Ibid.
142. Grdic v. R. (1985), 19 C.C.C. (3d) 289 S.C.C., at p. 293.
143. Supra, note 35, at pp. 497-498.
144. James C. ^(MORTON)~~Martin~~ and Scott C. Hutchison, The Presumption of Innocence, (Toronto: Carswell, 1987), at p. 14.
145. Sentencing Reform: A Canadian Approach, Report of the Canadian Sentencing Commission, (Canadian Government Publishing Centre, Ottawa, 1986), 115.
146. Ibid., at 109.
147. Ibid., at 115.
148. Supra, note 9, at p. 25. It is also noteworthy that the new British scheme does not require imprisonment. See s. 133(6). For the purposes of this section a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he is convicted.
149. See supra, note 88: 961st Meeting, 19 November 1959, para 8, p. 260; 965th Meeting, 23 November 1959, para. 3, p. 275; 967th Meeting, 25 November 1959, para. 37 pp. 287-288.
150. Supra, note 10, at p. 26.
151. See Appendix A, Section C, p. 2.
152. Ibid.
153. Supra, note 41.
154. Supra, note 15, at p. 498.
155. Supra, note 80.
156. Halsbury's Statutes Service: Issue 24, Criminal Justice Act 1988, Volume 12, Criminal law, at p. 290.
157. (1988) 31st. Annual Report, Justice, the British Section of the International Commission of Jurists, (London: 1988), at p. 28.

158. Supra, note 9, at pp. 26-27.
159. See Home Office Letter to Claimants, Appendix C of the Justice Report, supra, note 5, at pp. 31-32.
160. See the November 29, 1985 statement, supra, note 41.
161. Supra, note 80.
162. For example, the Criminal Bar Association (Sixth Report from the Home Affairs Committee, supra, note 47, at pp. vi-viii, et seq.) and apparently the Prison Reform Trust and the Labour Party Civil Liberties Group have joined in these criticisms (See November 29, 1985 statement, supra, note 41 at p. 1.)
163. In their Sixth Report, ibid. at p. xi, the Committee recommended that all qualifying petitions be referred to an independent review body charged with advising the Home Secretary.
164. Therefore, the Government Reply to the Sixth Report from the Home Affairs Committee, Session 1981-82 HC 421 at para. 15 contains the conclusion "that it [the Government] should not establish an independent review body as proposed by the Committee." This stand was reiterated in 29 November, 1985 letter to Justice, which commented at p. 2 upon the contemporaneous Ministerial statement: "We have seen no strong case for creating an independent body to decide on whether and how much compensation should be paid."
165. Most administrative law texts will address these issues. For example, see Jones and DeVillars, supra, note 69, especially Chapters 3 and 4.
166. Supra, note 9, at p. 41. See also p. 34 of the Report: "We favour the view that an appeal or judicial review, depending on the nature of the forum in which the award is made, be available to both the claimant and the state."
167. "The provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions."
168. Supra, note 9, at p. 43.
169. Supra, note 4, at p. 115, para. 484.
170. Ibid., at p. 117, para. 492.
171. Ibid., at p. 115, para. 486.
172. Supra, note 9, at p. 34.
173. Ibid.
174. Ibid., p. 35.
175. Supra, note 4, at p. 115, para. 487.

176. (1978), 83 D.L.R. (3d) 452.
177. Ibid., at p. 478.
178. Ibid., at p. 475.
179. Ibid., at p. 476.
180. Supra, note 9, at pp. 33-34.
181. Ibid., at p. 44.

COMPENSATION FOR WRONGFULLY CONVICTED
AND IMPRISONED PERSONS

GUIDELINES

The following guidelines include a rationale for compensation and criteria for both eligibility and quantum of compensation. Such guidelines form the basis of a national standard to be applied in instances in which the question of compensation arises.

A. RATIONALE

Despite the many safeguards in Canada's criminal justice system, innocent persons are occasionally convicted and imprisoned. Recently three cases (Marshall, Truscott, and Fox) have focussed public attention on the issue of compensation for those persons that have been wrongfully convicted and imprisoned. In appropriate cases, compensation should be awarded in an effort to relieve the consequences of wrongful conviction and imprisonment.

B. GUIDELINES FOR ELIGIBILITY TO APPLY FOR COMPENSATION

The following are prerequisites for eligibility for compensation:

- 1) The wrongful conviction must have resulted in imprisonment, all or part of which has been served.
- 2) Compensation should only be available to the actual person who has been wrongfully convicted and imprisoned.
- 3) Compensation should only be available to an individual who has been wrongfully convicted and imprisoned as a result of a Criminal Code or other federal penal offence.
- 4) As a condition precedent to compensation, there must be a free

pardon granted under Section 683(2) [749(i)] of the Criminal Code or a verdict of acquittal entered by an Appellate Court pursuant to a referral made by the Minister of Justice under Section 617(b) [690(b)].

5) Eligibility for compensation would only arise when Section 617 and 683 were exercised in circumstances where all available appeal remedies have been exhausted and where a new or newly discovered fact has emerged, tending to show that there has been a miscarriage of justice.

As compensation should only be granted to those persons who did not commit the crime for which they were convicted, (as opposed to persons who are found not guilty) a further criteria would require:

a) If a pardon is granted under Section 683 [749], a statement on the face of the pardon based on an investigation, that the individual did not commit the offence: or

b) If a reference is made by the Minister of Justice under Section 617(b) [690], a statement by the Appellate Court, in response to a question asked by the Minister of Justice pursuant to Section 617(c) [690(c)], to the effect that the person did not commit the offence.

It should be noted that Sections 617 [690] and 683 [749] may not be available in all cases in which an individual has been convicted of an offence which he did not commit, for example, where an individual had been granted an extension of time to appeal and a verdict of acquittal has been entered by an Appellate Court. In such a case, a Provincial Attorney General could make a determination that the individual be eligible for compensation, based on an investigation which has determined that the individual did not commit the offence.

C. PROCEDURE

When an individual meets the eligibility criteria, the Provincial or Federal Minister Responsible, for Criminal Justice will undertake to have appointed, either a judicial or administrative inquiry to examine the matter of compensation in accordance with the considerations set out below. The provincial or federal governments would undertake to act on the report submitted by the Commission of Inquiry.

D. CONSIDERATIONS FOR DETERMINING QUANTUM

The quantum of compensation shall be determined having regard to the following considerations:

1. Non-pecuniary losses

- a) Loss of liberty and the physical and mental harshness and indignities of incarceration;
- b) Loss of reputation which would take into account a consideration of any previous criminal record;
- c) Loss or interruption of family or other personal relationships.

Compensation for non-pecuniary losses should not exceed \$100,000.

2. Pecuniary Losses

- a) Loss of livelihood, including loss of earnings, with adjustments for income tax and for benefits received while incarcerated;
- b) Loss of future earning abilities;
- c) Loss of property or other consequential financial losses resulting from incarceration.

In assessing the above mentioned amounts, the inquiring body must take into account the following factors:

- a) Blameworthy conduct or other acts on the part of the applicant which contributed to the wrongful conviction;
- b) Due diligence on the part of the claimant in pursuing his remedies.

3. Costs to the Applicant

Reasonable costs incurred by the applicant in obtaining a pardon or verdict of acquittal should be included in the award for compensation.

TERM OF REFERENCE 6

“What sum, if any, should be paid by way of Compensation to Arthur Allan Thomas Following upon the Grant of the Free Pardon?”

474. Compensation is not claimable as of right. It is in the nature of an ex gratia payment, sometimes made by the Government following the granting of a free pardon, or the quashing of a conviction. Being in the nature of an ex gratia payment, there are no principles of law applicable which can be said to be binding.

475. We have obtained as much information as possible from other Commonwealth countries concerning this subject. Even in England there is no other case we can find to be at all similar to that of Arthur Allan Thomas, i.e., of a man who served 9 years in prison not because of a mistake, but because of evidence fabricated by the Police.

476. However, the Home Office in England has provided for our information the guidelines under which compensation is usually assessed there and these have been very helpful.

477. There, following a decision from the Home Secretary that compensation should be offered in a particular case, an explanatory note is sent to the claimant. We quote from its contents:

“A decision to make an ex gratia payment from public funds does not imply any admission of legal liability; it is not, indeed, based on considerations of liability, for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages.”

“In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and nonpecuniary loss arising from the conviction and/or loss of liberty, and any or all of the following factors may thus be relevant according to the circumstances:

- Pecuniary loss.
- Loss of earnings as a result of the charge or conviction.
- Loss of future earning capacity.
- Legal costs incurred.
- Additional expense incurred in consequence of detention, including expenses incurred by the family.
- Nonpecuniary loss.
- Damage to character or reputation.
- Hardship, including mental suffering, injury to feelings and inconvenience.”

“When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation.”

“In considering the circumstances leading to the wrongful conviction or charge the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the Police or other public authority, or might have been contributed to by the accused person's own conduct. The amount offered will accordingly take account of this factor, but will not include any element analogous to exemplary or punitive damages.”

"The claimant is not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstances of his prosecution or conviction, or his detention in either or both of these connections."

478. The free pardon granted to Arthur Allan Thomas on 17 December 1979 included the following words:

"And whereas it has been made to appear from a report to the Prime Minister by Robert Alexander Adams-Smith QC, that there is real doubt whether it can properly be contended that the case against the said Arthur Allan Thomas was proved beyond reasonable doubt."

479. Section 407 of The Crimes Act 1961 states:

"Effect of free pardon. Where any person convicted of any offence is granted a free pardon by Her Majesty, or by the Governor-General in the exercise of any powers vested in him in that behalf, that person shall be deemed never to have committed that offence: provided that the granting of a free pardon shall not affect anything lawfully done or the consequences of anything unlawfully done before it is granted."

480. We have now been given some guidance by a full Court of the High Court of New Zealand concerning the effect of this pardon. In their decision dated 29 August 1980 the full Court stated:

"In the terms of the pardon Thomas is to be considered to have been wrongly convicted, and he cannot be charged again with the murder of either Harvey or Jeanette Crewe."

"He is, by reason of the pardon, deemed to have been wrongly convicted."

"The language of section 407 does not indicate any intention to create any such radical departure from the normal effect of a prerogative pardon as would be involved in reading into the language an intention to create a statutory fiction, the obliteration by force of law of the acts of the person pardoned. It is much more sensibly read to be as, first a reaffirmation of the basic effect of the prerogative pardon, and, secondly, an attempt to minimise residual legal disabilities or attainders."

481. We approach the question of the compensation in the light of that guidance, and also in the light of our findings as set out earlier in this report.

482. The pardon alone makes it clear that Mr Thomas should never have been convicted of the crimes, since there was a real doubt as to his guilt. He should accordingly have been found not guilty by the juries. Our own findings go further. They make it clear that he should never even have been charged by the Police. He was charged and convicted because the Police manufactured evidence against him, and withheld evidence of value to his defence.

483. At our hearings there have been often repeated statements about whether Mr Thomas can be proved innocent. Such a proposition concerns us. It seems to imply that there falls on to him some onus positively to prove himself innocent. Such a proposition is wrong and contrary to the golden thread which runs right through the system of British criminal

justice, namely that the Prosecution has the duty to prove the accused guilty and until so proved he had to be regarded as innocent. Once we are satisfied the Prosecution case against Mr Thomas has not been proved (and we are so satisfied on the totality of evidence before us) then, just as a Court would acquit him and the community thereafter accept his innocence, so we believe we are entitled to proclaim him innocent and proceed accordingly. Mr Thomas has always asserted his innocence. Taking all these factors into account, along with the pardon, it is our view that Mr Thomas is entitled to have the question of compensation determined on the basis that he is innocent. To determine it on any other basis would be to do him the gravest injustice.

484. This Commission is privileged to have been given the task of righting wrongs done to Thomas, by exposing the injustice done to him by manufactured evidence. We cannot erase the wrong verdicts or allow the dismissed appeals.

485. The British system of criminal justice is an adversary system. It receives only such facts as are put before it by the parties, discovering only so much of the truth as this permits. Any such system to function properly is dependent upon fair and truthful information being put before it. Like a computer, given the wrong facts it will without doubt produce the wrong answers, and this it did in the Thomas case.

486. This Commission is not in an adversary situation. We have searched for the truth, probed, inquired, and interrogated where we thought necessary; made our displeasure apparent at prevarication and reluctance to speak the truth. We have not been content with so much of the truth as some saw fit to put before us. With the aid of scientists we were able to demolish the cornerstone of the Crown case, exhibit 350, and demonstrate that it was not put in the Crewe garden by the hand of the murderer. It was put there by the hand of one whose duty was to investigate fairly and honestly, but who in dereliction of that duty, in breach of his obligation to uphold the law, and departing from all standards of fairness fabricated this evidence to procure a conviction of murder. He swore falsely, and beyond a peradventure, was responsible for Thomas being twice convicted, his appeals thrice dismissed, and for his spending 9 years of his life in prison; to be released as a result of sustained public refusal to accept these decisions. The investigation ordered by the Government led finally to his being granted a free pardon and released by the ultimate Court of a democratic system—what Lord Denning calls 'The High Court of Parliament.' Common decency and the conscience of society at large demand that Mr Thomas be generously compensated.

487. Arthur Allan Thomas was arrested on 11 November 1970 and remained in custody until 17 December 1979. During that time he was held in three prisons—Mount Eden, Auckland (commonly known as Paremoremo), and Hautu. We heard evidence from Mr Thomas and others concerning the conditions of his imprisonment and its effects on him. Evidence was also brought of the tribulations and anguish attaching to the judicial procedures. We accept that his formerly happy marriage was destroyed by this whole affair. Quite apart from the various indignities and loss of civil rights associated with his deprivation of liberty, we consider he will for the rest of his life suffer some residual social disabilities attributable to the events of the last 10 years.

488. We now consider the amount of compensation to be awarded to him to compensate him for all the damage, suffering, and anguish he has sustained mentally and physically as a consequence of his wrongful

convictions and subsequent years in prison. His learned counsel has listed these:

- (a) Loss of reputation.
- (b) Humiliation.
- (c) Pain and suffering.
- (d) Loss of wife.
- (e) Physical assaults whilst in prison, and degradation.
- (f) Loss of enjoyment of life.
- (g) Loss of potential family (the Thomas couple had commenced the procedures for adopting a child).
- (h) Deprivation of liberty.
- (i) Loss of civil rights such as voting rights.
- (j) Loss of social intercourse with his friends and neighbours in particular at Pukekawa.
- (k) The indignation of being imprisoned for an offence of which he was innocent.
- (l) The harm and pain caused to him in the destruction of his reputation by press coverage and any other media broadcasting and disseminating false and incorrect information about his alleged involvement in the said homicides.
- (m) The anguish of judicial proceedings and in particular hearing wrong verdicts being announced.
- (n) The ignominy of prison visitation and all matters relating to being a prisoner, including prison dress, prison diet, maximum security conditions, and all matters relating to his life in prison. It should be borne in mind that Arthur Thomas had always been an outdoor man and his first 7 years were spent in Paremoremo where he never was outside on any occasion except to attend Court proceedings.
- (o) Adverse effects on future advancement, employment, marriage, social status, and social relations generally.

489. It is clear that at the outset, Mr Thomas put his trust in the Police. That trust must have been shaken when the Police arrested him. Even then, he may have seen the arrest as an honest mistake. Such trust as remained must have been shattered when exhibit 350 was produced as an exhibit. Mr Thomas must have known from the first that it had been planted by the Police. He must then have realised that the Police were determined to convict him. It is undoubtedly a deep form of mental anguish to listen to false evidence being given against oneself.

490. At that stage, Mr Thomas put his faith in the judicial system. It is clear that he expected the charges against him to be dismissed at the preliminary hearing. They were not. He must then have relied on the commonsense and the fairness of the jury at the first trial. They convicted him. His state of mind in hearing announced a verdict he knew to be wrong, must have been one of unspeakable anguish.

491. Mr Thomas spent 9 years in prison. That a man is locked up for a day without cause has always been seen by our law as a most serious assault on his rights. That a man is wrongly imprisoned for 9 years, is a wrong that can never be put right. The fact that he is imprisoned on the basis of evidence which is false to the knowledge of Police Officers, whose duty it is to uphold the law, is an unspeakable outrage.

492. Such action is no more and no less than a shameful and cynical attack on the trust that all New Zealanders have and are entitled to have in their Police Force and system of administration of justice. Mr Thomas

suffered that outrage; he was the victim of that attack. His courage and that of a few very dedicated men and women who believed in the cause of justice has exposed the wrongs which were done. They can never be put right. In a civil claim exemplary damages may be awarded where there has been oppressive, arbitrary, or unconstitutional action by the servants of the Government. If ever there was a situation where such an award was warranted, it is this case. However, in awarding compensation this is only one of many features to which regard will be had in arriving at the final figure.

493. In assessing compensation one purpose is to put the claimant back in the financial position in which he would have been but for the wrongs which were done to him. Accordingly, we now consider Mr Thomas's pecuniary losses. In June 1966 he leased from his father, for a term of 5 years, three blocks of land at Pukekawa formerly run as one farm unit. Two of these blocks were owned by his father who leased the third block from the Maori Affairs Department. Arthur Thomas and his wife both worked on the farm. They ran dairy cows, dairy beef, and sheep. Various improvements were made during the term of the lease. There is clear evidence in documentary form establishing that, at the time some of the improvements were carried out, Arthur Thomas discussed with his father the possibility of acquiring an interest in the land at the conclusion of the lease in June 1971. Their discussion envisaged the acquiring of the freehold of the Maori Affairs land, the transferring of the titles to all three properties to a company, the stock (owned by Arthur Thomas) also to be transferred to the company, with Arthur's share in the company to be calculated in accordance with the value of the stock transferred and value of improvements carried out by him during the term of the lease. In evidence it was suggested that the company may also have proceeded to acquire other adjoining blocks of land. However, it has also been suggested that instead of using the suggested company as a vehicle, Arthur Thomas might alternatively have simply purchased the farm from his father.

494. Mr P. D. Sporle, Farm Appraiser and Valuer, gave helpful evidence in relation to the Thomas farming operation. In 1971 a fair valuation of the whole farming unit was \$45,200. We also accept the financial feasibility of Arthur Thomas being able to purchase this land in June 1971 if events had so transpired.

495. At the time of his arrest in 1970 Arthur Thomas owned his own stock (milking cows, replacements, dairy beef, and sheep) and farm plant, in addition to which he had an interest in certain substantial improvements carried out by him under the terms of the lease which we have already referred to. Following his arrest, although his wife with assistance from other members of the family did manage to carry on the farming operation for some time, these assets have clearly been dissipated by the expenses incurred in the judicial procedures.

496. Since 1970, as is well known, the value of farm land has increased very substantially. Mr Sporle considered that present day values for this or a comparable farm are in the region of \$380,000 to \$400,000. He also set forth a realistic progression for such a farm in the intervening 9 years, particularly in terms of stock and plant. In the result we accept that by 1980 such a farming operation would be likely to have involved stock, plant, and other necessary investments such as dairy company shares all to the value of approximately \$100,000. The acquisition of personal effects and chattels is also borne in mind.

497. There are various contingencies which are to be borne in mind. At the time of Arthur Thomas's arrest no decisions had in fact been made about the future of the farm. Arthur was one of nine children. While it seems clear that his father was satisfied to see Arthur acquire the farm, we do not believe this would have been done on a basis which would have disadvantaged the other eight children. We have formed a view of Arthur Thomas as being a capable farmer who, unless prevented by some unknown contingencies of life, would be likely to have proceeded to acquire the farm or an interest in it. It seems reasonable to suggest that from the value of the farm, stock, and plant, we should allow for the likelihood of there being some mortgage commitments at this stage of his life. We consider a reasonable sum to put him back in the position where he would have been, in respect of the farm, stock and plant, and personal effects, is \$450,000.

498. Mr Thomas incurred liabilities relating to his arrest and prosecution, in the form of legal and other expenses. In addition, further outgoings have been incurred in preparing his claim for compensation for presentation before us. Details of these outgoings are set out in appendix III attached.

499. We have received claims for compensation from the parents of Arthur Thomas, all his brothers and sisters (including their spouses), a cousin, two members of the Arthur Allan Thomas Retrial Committee (one of whom is related by marriage to the former Mrs Thomas), and the former Mrs Vivien Thomas (now Mrs Harrison).

500. These claims raise three questions of principle:

- (a) Does Term of Reference 6 envisage or allow us to consider them either directly or indirectly as part of Arthur Allan Thomas's own claim?
- (b) Apart from the Terms of Reference does experience elsewhere in the Commonwealth or any principle of law by analogy suggest that such claims should be entertained?
- (c) If such claims are to be considered favourably, who should be regarded as eligible to make them, and in what respect?

501. We proceed to deal with each of those questions, and it is convenient first to deal with (b).

502. Reference has already been made to the explanatory note forwarded to all claimants by the English Home Office. That note states that one of the factors which is relevant to the assessors' consideration of the claim is—'Additional expense incurred in consequence of detention, including expenses incurred by the family.' It seems to us that this specifically envisages as falling within the claim of the detained person, expenses incurred by his family in consequence of his detention.

503. We have also given consideration to a number of cases in the field of claims in tort for damages arising from personal injuries, where there are to be found successful claims by the injured person to recover damages for himself which included amounts for nursing and other services provided by relations. In these cases the loss has been regarded as the plaintiff's loss.

504. We consider that both the direction in the English explanatory note, and the personal injury cases to which we have referred, support the concept that within the claim of Arthur Allan Thomas there should be considered certain expenditure incurred and services rendered by members of his family.

505. It being accepted that the need for relatives' services about which we are speaking is to be regarded as part of the claimant's own loss, then it is within Term of Reference 6 to include such amounts in the award made.

506. The third question concerns the persons from whom such claims should be entertained and the nature of those claims. We must immediately make clear that in our view there is no question of anyone other than Arthur Allan Thomas recovering compensation for non-pecuniary losses. We sympathise with the plight of some of the family, particularly the parents, in the physical and mental injury they have suffered. But we are bidden to determine the amount of compensation to be paid to Arthur Allan Thomas; subject to the limited extent of services rendered by relatives to meet a need caused by his arrest and imprisonment, there is no other category of compensation included.

507. The expenses and services of the family which we believe should be regarded as within the claim of Arthur Allan Thomas are:

(a) Help on the farm after his arrest.

(b) Expenses incurred in visiting him in prison (which we consider to have been an assistance to his well-being).

We do not feel able to include any sum for the time spent, or out of pocket expenditure, in searching for further evidence, attending judicial hearings, or attending meetings, etc., aimed at securing his release. ?

508. The above statements of principle largely answer the question of whose services and expenditure should be regarded as falling under this category. It also seems reasonable to limit it to members of the immediate family.

509. On the above basis we set out in appendix IV the sums which we consider should be paid to Arthur Allan Thomas in recompense for the physical help and services rendered by members of the family.

510. Finally on this topic, we turn to consider the position of Dr T. J. Sprott, the man who in our view more than any other was responsible for the eventual release of Mr Thomas. It was well summed up by senior counsel for the DSIR in his final submission when he said 'I say without qualification that his dedication to, and development of, the categories theory, which has played such a large part in this inquiry invokes any impartial observer's admiration. . . . It is difficult to single out anyone who has been more committed or effective in advancing (Mr Thomas's) case than Dr Sprott.'

511. Dr Sprott himself acknowledges that his work was not carried out under any contractual arrangement with Mr Thomas or his legal advisors. On the other hand, the researches which he carried out over a number of years were directly related to a key issue of the question of Thomas's guilt or innocence, and were as essential to the findings of this Commission in regard to the identification of the fatal bullets as they were to the events leading to the pardon. The guidance from the Home Office states, 'When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence, or pursuing the claim for compensation.'

512. Dr Sprott has entered a formal claim for \$150,000 compensation based on the hours which he estimates were spent in this scientific work.

513. By a majority (Mr Gordon dissenting) we consider that some financial recompense for this scientific work is justified and recommend the payment of an amount of \$50,000.

CONCLUSIONS

514. Money cannot right the wrongs done to Mr Thomas or remove the stain he will carry for the rest of his life. The high-handed and oppressive actions of those responsible for his convictions cannot be obliterated. Nevertheless all these elements are to be reflected in our assessment, as also are his suffering, loss of enjoyment and amenities of life, and his pecuniary loss.

515. We recommend that the following sums be paid to Arthur Allan Thomas as compensation:

	\$
(a) In repayment of the expenditure set out in appendix III the sum of	49,163.35
(b) In repayment of the services of members of his family set out in appendix IV the sum of ...	38,287.00
(c) By a majority, in payment of the services rendered by Dr Sprott, the additional sum of	50,000.00
(d) To cover all those matters referred to in paragraphs 497-507 the additional sum of ...	950,000.00
Total	<u>\$1,087,450.35</u>

516. We draw attention to the immense labour of Mr Patrick Booth in the field of investigative journalism. This was carried out as a private enterprise and at some considerable sacrifice to family life. He has formally claimed only a token \$1. We are more than glad to include our recognition of the devotion of Mr Booth to this cause.

Addendum of the Right Honourable J. B. Gordon to Term of Reference 6.

517. Our report is unanimous except for one aspect in which a majority decision is recorded. I set out hereunder the reasons I could not support my fellow Commissioners in relation to a payment of compensation through Arthur Allan Thomas for recognition of a suggested debt owed by him to Dr Sprott.

518. The Term of Reference is specific:

“6. What sum if any should be paid by way of compensation to Arthur Allan Thomas following upon the grant of a free pardon?”

519. My fellow Commissioners here decided to follow the Home Office advice (which is not binding in any case):

“When making his assessment the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation.”

520. My colleagues believe that the term ‘otherwise’ can be loosely interpreted as covering any expenses. My reading of the paragraph as a whole, including particularly the words ‘incurred by the claimant’ suggests that it in fact covers legal costs or contractual debts, and to this extent Dr Sprott’s claim, in which he very fairly states there is no contractual or legal liability, cannot be accepted. In my view he was under no such obligation to Thomas, the claimant.

521. It is with some regret that I must make this decision, but find it in line with the Commission's unanimous finding that it cannot within the Terms of Reference compensate Arthur Allan Thomas's parents for their own pecuniary loss or debilitation. I find that the Home Office advice on these particular matters is quite distinct from the Commission's decision to recompense Thomas for the costs incurred to the family for care and solicitude. While I can sympathise with Dr Sprott and several other claimants, it was Dr Sprott himself who told us he saw his monumental task 'as a crusade'. My opinion is, I respectfully suggest, enhanced by Mr Booth's claim for \$1.

522. We have had many 'crusaders' in New Zealand attempting to right a wrong or fight for a principle (with some success in both) at great personal sacrifice in time and money. Some have been rewarded in other ways, and this in my opinion is the only avenue open for this Commission to make a recommendation within our Terms of Reference.

523. I do so recommend.

IDENTIFICATION OF EXHIBIT 350

Before the Commission continues hearing evidence relating to Term of Reference 1(a), it is desirable to identify and define the cartridge case (exhibit 350) (8 July 1980).

1. Exhibit 350 was a dry primed brass long rifle cartridge case, manufactured by IMI Australia Ltd.

2. Such dry primed cartridge cases as exhibit 350 were made by IMI with a steel tool known as a bumper, which stamped the lettering ICI on the base of the cartridge case as it formed its rim. The bumper was in turn manufactured from a steel tool known as a hob, which had the letters ICI engraved on its surface.

3. The engravers of hobs used by IMI were C. G. Roeszler & Son Pty Ltd., and Mr Leighton of that company gave evidence that from a practical point of view, two hobs engraved on different occasions would have lettering of distinguishable shape and overall appearance. His opinion was supported on a theoretical basis by Professor Mowbray's eloquent exposition.

4. Mr Cook's evidence, confirmed by that of Dr Sprott from his examination of the IMI records, was that:

(a) Two hobs engraved by Roeszlers arrived at IMI on 1 October 1963;

(b) Retained samples of cartridge cases consistent with those hobs, and with exhibit 350, and of the type called by Dr Sprott category 4, first appeared in the retained samples of IMI in March 1964.

We are satisfied that the hobs which arrived on 1 October 1963 were the source of Dr Sprott's category 4, and of exhibit 350.

5. Some of the .22 long rifle cartridge cases manufactured by IMI were then shipped to Auckland, New Zealand where the Colonial Ammunition Co. Ltd., (CAC) then loaded them with projectiles and distributed them to the New Zealand market as full cartridges. Until 10 October 1963 .22 brass cartridge cases were loaded by CAC with their pattern 8 projectiles, bearing 3 cannelures. After that date pattern 18 or 19 projectiles bearing 2 cannelures were used. It follows that exhibit 350 was loaded with a pattern 18 or pattern 19 projectile.

6. At the conclusion of his evidence, Mr MacDonald, the senior DSIR witness accepted that it was less than probable that exhibit 350 contained a pattern 8 bullet.

7. Therefore, the Commission identifies exhibit 350 as a dry primed, .22 long rifle brass cartridge case, manufactured by IMI in Australia after March 1964, bearing the headstamp 'ICI', and loaded by CAC in Auckland with a 2 cannelure pattern 18 or 19 projectile. It was fired in the Thomas rifle, exhibit 317, but when and where we are unable to say at this stage.

8. This identification of exhibit 350 will enable those who are concerned with the first paragraph of the Terms of Reference to be aware of the subject matter and area of the inquiry into 'Whether there was any impropriety on any person's part in the course of the investigation or subsequently, in respect of the cartridge case, Exhibit 350.'

AFFIDAVIT BY MR DAVID YALLOP

IN THE MATTER of a Royal Commission to enquire into and report upon the convictions of Mr A. A. Thomas for the murder of Harvey and Jeanette Crewe

I, DAVID ANTHONY YALLOP of 6 Gladwell Road, London N.8, England, author and playwright, solemnly and sincerely affirm as follows:

1. I am the author of the book *Beyond Reasonable Doubt?* published in October 1978.

2. Chapter 8 of that book is an open letter to the Prime Minister of New Zealand and refers to another, private, letter which I wrote to the Prime Minister. In that private letter, a copy of which is annexed hereto and marked with the letter "A", I identified the woman who, I believed, had fed Rochelle Crewe between the 17th and 22nd June 1970 and had been seen by Mr Roddick outside the Crewe house on the morning of 19th June 1970.

3. The source of my information was a discussion which Mrs June Donaghie had with Mr. Roddick on my behalf in Sydney in November 1977. I did not go to Sydney myself because I could not afford to do so. Attached hereto and marked with the letter "B" is a copy of the photograph of the woman who, as I understand, was identified by Mr. Roddick as the woman he saw on 19th June 1970.

4. On 15th October 1980 I was shown by Mr. M. P. Crew, Counsel assisting the Royal Commission, a copy of an Affidavit sworn on 16th November 1978 by June Donaghie in relation to this matter. I had not previously seen the Affidavit. I confirm that it accurately reflects what June Donaghie told me had occurred during her discussion with Mr. Roddick. I understand that there are in existence further Affidavits sworn by witnesses confirming June Donaghie's account.

5. Attached hereto and marked with the letter "C" is an undated letter postmarked 17th November 1977 which June Donaghie wrote to me from Australia following her discussion with Mr Roddick. The terms of that letter are consistent with what June Donaghie told me had occurred and with her Affidavit dated 16th November 1978.

6. Following the publication of my book, Mr P. J. Booth visited Mr Roddick in Australia. I had previously told Mr Booth the name of the woman Mr Roddick had identified and given him the source of the photograph. I made it clear to Mr Booth that Mr Roddick should not be told the name of the woman to avoid his becoming frightened by the implications of the identification. I am aware, however, that Mr Booth did tell Mr Roddick the name of the woman.

7. I understand that Mr Roddick said in evidence before the Royal Commission that the woman in the photograph was similar only to the woman he saw. I further understand that he denied ever positively identifying the woman in the photograph as the woman he saw on 19th June 1970. It is my belief that realisation of the implications of his evidence may have caused Mr Roddick to modify his evidence, as I feared might happen. This is confirmed to some degree by paragraph 21 of the first report made to the Prime Minister by Mr Adams-Smith Q.C. I would not have been categoric regarding the identity of this woman if Roddick had not previously been as equally categoric.

8. Other than Mrs Donaghie's reports to me, I had no direct information as to the identity of the woman seen by Mr Roddick on 19th June 1970. I am, however, of the view that the identification is supported to some extent by:

- (a) Mr Roddick's original description of the woman he saw in his statement to the Police dated 23rd June 1970;
- (b) Mr MacLaren's comment set out in the fourth to last paragraph of my letter to the Prime Minister attached hereto and marked with the letter "A".

Affirmed at London by the said DAVID ANTHONY YALLOP this 28th day of October 1980.

"David A. Yallop".

Before me,
"G. W. Shroff", Commonwealth Representative, New Zealand High
Commission, London.

APPENDIX III

EXPENSES

W. J. Bridgman and Co.	...	...	...	...	\$	2,600.00
P. D. Sporle	...	...	...	...		5,542.28
Gerald Ryan	...	...	...	...		500.00
Prof. B. J. Brown	...	...	...	...		750.00
R. L. McLaren	...	...	...	...		2,671.07
A. G. Thomas (refund legal fees paid)	...	...	...	...		16,500.00
K. Ryan (legal fees outstanding)	...	...	...	...		8,500.00
P. A. Williams (legal fees outstanding)	...	...	...	...		12,100.00
						<u>49,163.35</u>

APPENDIX IV

Mr and Mrs Hooton	...	...	...	...	\$	1,350.00
Mr and Mrs Stuckey	...	...	...	...		2,100.00
Raymond Thomas	...	...	...	...		5,400.00
Lloyd Thomas	...	...	...	...		5,322.00
Desmond Thomas (including costs of preparation of claim \$300.00)						5,420.00
Richard Thomas	...	...	...	...		1,800.00
Lyrice Hills (including costs of preparation of claim \$150.00)						3,050.00
Rita Tyrrol	...	...	...	...		1,275.00
Allan G. Thomas	...	...	...	...		2,250.00
Vivien Harrison	...	...	...	...		10,500.00
						<u>38,467.00</u>

Pierre Nadeau Appellant;

and

Her Majesty The Queen Respondent.

File No.: 17596.

1984: November 21; 1984: December 13.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Murder — Charge to jury — Burden of proof — Two versions of events surrounding homicide presented in evidence — Self-defence — Misdirection — New trial ordered — Criminal Code, R.S.C. 1970, c. C-34, s. 613(1)(b)(iii).

Appellant was charged with first-degree murder. At trial, two different versions of the circumstances surrounding the homicide were presented in evidence: that of the accused, corroborated by his concubine, and that of the witness for the Crown. The trial judge directed the jury on the rules of law governing self-defence—one of the defences presented by the accused—and told them the standard and the burden of proof on the Crown with regard to establishing the facts which constitute the essential components of the offence, and the standard applicable to any accused with regard to his defence arguments. Appellant was convicted of second-degree murder and the Court of Appeal upheld the conviction. This appeal is to determine whether the trial judge erred in his directions to the jury.

Held: The appeal should be allowed and a new trial ordered.

The trial judge erred in law on the question of the burden of proof regarding the contradictory versions of the facts in issue. An accused benefits from any reasonable doubt at the outset, not merely if the two versions of the facts are equally consistent with the evidence or valid. Moreover, the jurors are not limited to choosing between the two versions. Even if they do not believe the accused, they cannot accept the other version of the facts unless they are satisfied beyond all reasonable doubt that the events in fact took place in the manner in which the witness for the Crown related them. Otherwise the accused is entitled to the finding of fact more favourable to him provided that it is based on evidence in the record and not mere speculation.

Pierre Nadeau Appellant;

et

Sa Majesté La Reine Intimée.

N° du greffe: 17596.

1984: 21 novembre; 1984: 13 décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer et Le Dain.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Meurtre — Exposé du juge au jury — Fardeau de la preuve — Deux versions des événements entourant l'homicide offertes en preuve — Légitime défense — Directives erronées — Nouveau procès ordonné — Code criminel, S.R.C. 1970, chap. C-34, art. 613(1)(b)(iii).

L'appellant a été accusé de meurtre au premier degré. Au procès, deux versions différentes des circonstances qui ont entouré l'homicide ont été présentées en preuve: celle de l'accusé, corroborée par sa concubine, et celle du témoin de la poursuite. Le juge du procès a instruit le jury sur les principes de droit qui régissent la légitime défense—l'un des moyens de défense invoqués par l'accusé—et il leur a indiqué la norme et le fardeau de preuve qui incombe à la poursuite relativement à la détermination des faits constitutifs de l'élément matériel de l'infraction ainsi que la norme dont bénéficie tout accusé en ce qui concerne ses moyens de défense. L'appellant a été déclaré coupable de meurtre au deuxième degré et la Cour d'appel a confirmé la déclaration de culpabilité. Le présent pourvoi vise à déterminer si le juge du procès a erré dans ses directives au jury.

Arrêt: Le pourvoi est accueilli et un nouveau procès est ordonné.

Le juge du procès a erré en droit sur la question du fardeau de la preuve relativement aux versions contradictoires des faits en litige. Un accusé bénéficie du doute raisonnable au départ et pas seulement si les deux versions des faits sont également concordantes ou valables. De plus, les jurés ne sont pas limités à choisir entre les deux versions. Même s'ils ne croient pas l'accusé, ils ne peuvent retenir l'autre version des faits que s'ils sont convaincus hors de tout doute raisonnable que les événements se sont effectivement passés comme le témoin de la poursuite les a relatés. À défaut l'accusé a droit à la détermination de fait qui lui est la plus favorable en autant qu'elle repose sur une preuve au dossier et n'est pas pure spéculation.

Furthermore, the trial judge also erred in law on the question of the burden of proof when he told the jurors that the accused had to prove his defence of self-defence beyond all reasonable doubt. The accused was entitled to the benefit of any reasonable doubt raised by the evidence respecting this defence.

Finally, section 613(1)(b)(iii) of the *Criminal Code* should not be applied in this case. The Crown did not show that, if it had been directed in accordance with the law, the jury would necessarily have brought in a verdict of guilty.

APPEAL from a judgment of the Quebec Court of Appeal¹, dismissing appellant's appeal from his conviction of second-degree murder. Appeal allowed.

Michel Proulx and Richard Masson, for the appellant.

Robert Lévesque, for the respondent.

English version of the judgment of the Court delivered by

LAMER J.—In this appeal, the applicable principles of law are well-known and are not in any way at issue. Rather, the question is whether the trial judge erred in law in his directions to the jury, and if so, whether his error was such that a new trial should be held. The Court of Appeal of Quebec considered that it should not. While agreeing with this conclusion, the Crown is asking this Court, if necessary, to apply the provisions of s. 613(1)(b)(iii) of the *Criminal Code*.

Appellant killed a man named Francœur with a rifle shot. He was charged with first-degree murder, and convicted of second-degree murder by a jury in New Carlisle, in the Gaspé area.

The incident occurred in the apartment of the accused's concubine, Miss Linda Caissy. One Landry, who said he was present in the apartment when the incident occurred, testified as to the circumstances surrounding the homicide. According to the accused and his concubine, Landry was not there, and they both gave the same version of the events leading to the killing of Francœur, but one which differed from that of Landry.

¹ Que. C.A., No. 200-10-000136-81, March 11, 1983.

De plus, en instruisant les jurés que l'accusé devait prouver sa défense de légitime défense hors de tout doute raisonnable, le juge du procès a de nouveau erré en droit sur la question du fardeau de la preuve. L'accusé devait bénéficier de tout doute raisonnable soulevé par la preuve relativement à cette défense.

Enfin, il ne convient pas en l'espèce d'appliquer l'art. 613(1)(b)(iii) du *Code criminel*. La poursuite n'a pas démontré que, instruit conformément à la loi, le jury aurait nécessairement conclu à un verdict de culpabilité.

POURVOI contre un arrêt de la Cour d'appel du Québec¹ qui a rejeté un appel de l'appelant déclaré coupable de meurtre au deuxième degré. Pourvoi accueilli.

Michel Proulx et Richard Masson, pour l'appelant.

Robert Lévesque, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE LAMER— Dans ce pourvoi, les principes de droit qui s'appliquent sont bien connus et ne sont nullement remis en question. Il s'agit plutôt de savoir si le juge de première instance a erré en droit dans ses instructions au jury, et ce, le cas échéant, au point de requérir un nouveau procès. La Cour d'appel du Québec fut d'avis que non. La Couronne tout en abondant dans ce sens, nous invite, au besoin, à appliquer les dispositions de l'art. 613(1)(b)(iii) du *Code criminel*.

L'appelant a tué d'un coup de carabine un dénommé Francœur. Accusé de meurtre au premier degré, il fut déclaré coupable par un jury de New Carlisle, en Gaspésie, de meurtre au deuxième degré.

L'incident s'est produit à l'appartement de la concubine de l'accusé, M^{lle} Linda Caissy. Un dénommé Landry, qui s'est dit présent dans l'appartement lors de l'incident, a témoigné quant aux circonstances entourant l'homicide. Selon l'accusé et sa concubine, Landry n'y était pas, et tous deux donnent une même version différente de celle de Landry des événements qui ont abouti à l'homicide de Francœur.

¹ C.A. Qué., n° 200-10-000136-81, 11 mars 1983.

Appellant presented five grounds, each charging that the judge had erred in his directions to the jury. In my opinion, the first ground, having regard to the burden of proof in criminal proceedings, succeeds, and requires that this Court order a new trial; it is therefore unnecessary to deal with the others.

For reasons which it is not necessary to elaborate, the judge had a duty, which he discharged, to direct the jurors on the rules of law governing "self-defence". He also had a duty, as in all cases, to inform them of the standard and the burden of proof applicable to the Crown, with regard to establishing the facts which constitute the essential components of the offence, as well as the standard applicable to any accused with regard to his defence arguments, in particular that of self-defence.

Appellant argues that he erred in law on these questions when he dealt with the burden of proof regarding the two versions of the incident, and regarding self-defence.

The Two Versions

After telling them they had to choose between the two versions, the judge explained the jury's task to them as follows:

[TRANSLATION] You have heard the analysis given of the two (2) versions throughout the day, and I do not intend to repeat it. I will simply say that in deciding how you make your choice, you must have one thing clearly in mind: you must choose the more persuasive, the clearer version, the one which provides a better explanation of the facts, which is more consistent with the other facts established in the evidence.

You must keep in mind that, as the accused has the benefit of the doubt on all the evidence, if you come to the conclusion that the two (2) versions are equally consistent with the evidence, are equally valid, you must give - you must accept the version more favourable to the accused. These are the principles on which you must make your choice between the two (2) versions.

(Emphasis added.)

With respect, this direction is in error. The accused benefits from any reasonable doubt at the outset, not merely if "the two (2) versions are

L'appelant soulève cinq motifs, chacun reprochant au juge des erreurs dans ses directives au jury. Le premier de ces moyens, qui est en regard du fardeau de la preuve en matières criminelles, est, à mon avis, fondé, et requiert que nous ordonnions un nouveau procès; il n'est donc pas nécessaire de traiter des autres.

Pour des raisons qu'il n'est pas nécessaire d'explicitier en l'espèce, le juge devait, comme il l'a d'ailleurs fait, instruire les jurés sur les principes de droit qui gouvernent la «légitime défense». Il devait aussi, comme dans toutes les causes, leur indiquer la norme et le fardeau de preuve qui incombe à la Couronne en regard de la détermination des faits constitutifs de l'élément matériel de l'infraction ainsi que la norme dont bénéficie tout accusé en regard de ses moyens de défense, et plus particulièrement, en regard de la légitime défense.

L'appelant dit qu'il a erré en droit sur ces questions lorsqu'il a traité du fardeau de preuve en regard des deux versions de l'incident, et en regard de la légitime défense.

Les deux versions

Après leur avoir dit qu'ils devaient choisir entre les deux versions, voici comment le juge explique au jury leur tâche, face à celles-ci:

Vous avez entendu l'analyse des deux (2) versions au courant de la journée, je n'ai pas l'intention d'y revenir. Je veux simplement vous dire que dans la recherche du choix que vous allez faire, vous devez avoir un objectif principal: c'est de choisir la version la plus probante, la plus claire, celle qui explique mieux les faits, celle qui est plus concordante avec les autres faits qui ont été prouvés dans la preuve.

Vous devez vous rappeler que l'accusé, ayant le bénéfice du doute sur l'ensemble de la preuve, s'il arrivait que vous en arriviez à la conclusion que les deux (2) versions sont également concordantes, sont également valables, vous devrez accorder - vous devrez retenir la version qui est la plus favorable à l'accusé. Alors, ce sont en vertu de ces principes-là que vous devez faire le choix entre les deux (2) versions.

(C'est moi qui souligne.)

Avec respect, cette directive est erronée. L'accusé bénéficie du doute raisonnable au départ, et non pas seulement si «les deux (2) versions sont

LTJ

equally consistent with the evidence, are equally valid". Moreover the jury does not have to choose between two versions. It is not because they would not believe the accused that they would then have to agree with Landry's version. The jurors cannot accept his version, or any part of it, unless they are satisfied beyond all reasonable doubt, having regard to all the evidence, that the events took place in this manner; otherwise, the accused is entitled, unless a fact has been established beyond a reasonable doubt, to the finding of fact the most favourable to him, provided of course that it is based on evidence in the record and not mere speculation.

Self-Defence

The judge told the jurors more than once that the accused had the benefit of a reasonable doubt at all times, and that the Crown had a duty to prove each of the component parts of the crime. Dealing with self-defence, he told them:

[TRANSLATION] I should tell you that here too, on self-defence, as on all the other defences which he may present, the accused is entitled to the benefit of the doubt in the event you are undecided whether any one component of the crime has been established.

Further, he said:

[TRANSLATION] In the event you conclude that the version of Nadeau and that of Linda Caissy should be accepted, you must examine self-defence: if you accept self-defence, you may bring in a verdict of acquittal.

In the event you conclude that self-defence was not established beyond all doubt, then you must examine the evidence to determine whether, at the time he fired this shot in the particular circumstances of the case, the accused could have formed—was capable of forming the specific intent of murder.

(Emphasis added.)

Although the jury requested and received further directions on other aspects of the law applicable in the circumstances, this direction was the final one given by the judge on self-defence. With respect, it is in error. Any reasonable doubt as regards his being in self-defence raised by the evidence enures to the accused, and he certainly

également concordantes, sont également valables». Les jurés ne sont pas limités à choisir entre deux versions. Ce n'est pas parce qu'ils ne croiraient pas l'accusé qu'ils seraient pour autant limités à agréer la version de Landry. Les jurés ne peuvent retenir sa version, ou portion de celle-ci, que s'ils sont, en regard de toute la preuve, satisfaits hors de tout doute raisonnable que les événements se sont passés comme tels; à défaut de quoi, et à moins qu'un fait ne soit prouvé hors de tout doute raisonnable, l'accusé a droit à la détermination de fait qui lui est la plus favorable, en autant, bien sûr, qu'elle repose sur une preuve au dossier et n'est pas pure spéculation.

La légitime défense

Le juge a dit aux jurés plus d'une fois que l'accusé devait bénéficier en tout temps du bénéfice du doute raisonnable, et qu'il incombait à la Couronne de prouver chacun des éléments constitutifs du crime. Traitant de la légitime défense il leur a dit:

Je dois vous dire qu'également ici, sur la légitime défense, comme sur toutes les autres défenses qu'il peut présenter, l'accusé a le droit au bénéfice du doute dans le cas où vous êtes indécis à savoir si l'un ou l'autre des éléments ont été prouvés.

Et plus loin:

Dans le cas où vous en venez à la conclusion d'accepter la version de Nadeau et de Linda Caissy, vous devez examiner la légitime défense; si vous acceptez la légitime défense, vous pouvez rapporter un verdict d'acquiescement.

Dans le cas où vous en venez à la conclusion que la légitime défense n'est pas prouvée hors de tout doute, eh bien vous pouvez examiner la preuve de façon à vous demander si l'accusé, au moment où il a tiré à ce moment-là dans les circonstances particulières, pouvait se former—était capable de se former une intention spécifique du meurtre.

(C'est moi qui souligne.)

Quoique le jury ait reçu, à sa demande, des directives additionnelles sur d'autres aspects du droit applicable en l'espèce, cette directive fut la dernière qu'il donnait en ce qui a trait à la légitime défense. Avec respect, elle est erronée. L'accusé bénéficie de tout doute raisonnable soulevé par la preuve à l'effet qu'il était placé en situation de

does not have to show beyond all reasonable doubt that he was placed in a position of self-defence.

In all fairness to the judge, I assume he meant to tell the jurors that, if they were satisfied beyond all reasonable doubt that the accused was not in a position of self-defence, they should not thereupon immediately conclude that he was guilty, but should consider whether he "was capable of forming the specific intent of murder". I feel certain that this is what the judge intended and thought he was telling the jury, since the judge in question is one of experience and great ability. Unfortunately, this is not what he said, and I can only conclude that the jurors could have been given the wrong impression as to the burdens of proof; particularly with regard to the preliminary choice which they could make, and might even have been required to make, of "the more persuasive . . . version".

The Crown suggested that this Court apply s. 613(1)(b)(iii). I have read the evidence in the record, and I am of the opinion that the Crown did not show the Court that, if it had been properly instructed in law, the jury would necessarily have brought in a verdict of second-degree murder, as it did.

I would allow the appeal, set aside the judgment of the Court of Appeal dismissing the appeal, and order a new trial on a charge of second-degree murder.

Appeal allowed.

Solicitors for the appellant: Proulx, Barot, Masson, Montréal.

Solicitor for the respondent: Robert Lévesque, New Carlisle.

légitime défense et n'a sûrement pas à le prouver hors de tout doute raisonnable.

En toute justice pour le juge, je crois qu'il voulait plutôt dire aux jurés que, s'ils étaient satisfaits hors de tout doute raisonnable que l'accusé n'était pas en situation de légitime défense, ils ne devaient pas pour autant conclure tout de go à sa culpabilité mais devaient se demander s'il «était capable de se former une intention spécifique du meurtre». C'est, j'en suis sûr, puisqu'il s'agit d'un juge d'expérience et de grande compétence, ce qu'il a voulu et a pensé leur dire. Hélas, ce n'est pas ce qui a été dit, et je ne peux que conclure que les jurés ont pu être laissés sous une impression erronée quant aux fardeaux de preuve; surtout en regard du choix préalable qu'ils pouvaient faire et même, le cas échéant, devaient faire de «la version la plus probante».

La Couronne nous suggère l'application de l'art. 613(1) b)(iii). J'ai lu la preuve au dossier et je suis d'avis que la Couronne ne nous a pas démontré que, instruit conformément à la loi, le jury eût nécessairement conclu, comme il l'a fait, à un verdict de culpabilité de meurtre au second degré.

J'accueillerai le pourvoi, infirmerai la décision de la Cour d'appel rejetant l'appel, et ordonnerai un nouveau procès, sur une accusation de meurtre au deuxième degré.

Pourvoi accueilli.

Procureurs de l'appellant: Proulx, Barot, Masson, Montréal.

Procureur de l'intimée: Robert Lévesque, New Carlisle.

Edward Martin Fanjoy *Appellant*;

and

Her Majesty The Queen *Respondent*.

File No.: 17172.

1985: January 25; 1985: October 10.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Powers of Court of Appeal — Errors at trial — Trial judge failing to limit cross-examination of accused and misdirecting jury on alibi defence — Errors prejudicial to accused — Section 613(1)(b)(iii) of the Code inapplicable to uphold conviction — Criminal Code, s. 613(1)(a)(iii), (b)(iii).

The Court of Appeal dismissed appellant's appeal against his conviction for gross indecency under s. 157 of the *Criminal Code*. Because of the strength of the Crown's circumstantial case against the appellant, the Court of Appeal applied the proviso of s. 613(1)(b)(iii) of the *Code* to uphold the conviction despite its findings (1) that the Crown's cross-examination of appellant dealing with his previous sexual conduct was improper and "could only unfairly prejudice the appellant" and (2) that the trial judge's direction with respect to appellant's alibi evidence was wrong and also prejudicial to him. This appeal is to determine whether the Court of Appeal erred in the application of s. 613(1)(b)(iii) of the *Code*.

Held: The appeal should be allowed.

The Court of Appeal erred in applying s. 613(1)(b)(iii) of the *Code* to uphold the conviction. The proviso of s. 613(1)(b)(iii) applies only where a court of appeal is of the opinion that on the ground of a wrong decision on a question of law an appeal might be decided in favour of the appellant, and where it is also of the opinion that no substantial wrong or miscarriage of justice has occurred. Here, the trial judge's failure to limit the cross-examination was an error of mixed law and fact and, accordingly, the conviction could not be saved by the application of the proviso. Having found that the abusive cross-examination was unfairly prejudicial to the appellant, the Court of Appeal should have allowed the appeal on the basis that there had been a

Edward Martin Fanjoy *Appelant*;

et

Sa Majesté La Reine *Intimée*.

N° du greffe: 17172.

1985: 25 janvier; 1985: 10 octobre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer et Le Dain.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Pouvoirs de la Cour d'appel — Erreurs du juge du procès — Omission de limiter le contre-interrogatoire de l'accusé et directives erronées quant à la défense d'alibi — Erreurs préjudiciables à l'accusé — Non-applicabilité de l'art. 613(1)(b)(iii) du Code pour confirmer la déclaration de culpabilité — Code criminel, art. 613(1)(a)(iii), (b)(iii).

La Cour d'appel a rejeté l'appel interjeté par l'appelant contre sa déclaration de culpabilité de grossière indécence prononcée en vertu de l'art. 157 du *Code criminel*. À cause de la force de la preuve circonstancielle du ministère public contre l'appelant, la Cour d'appel a appliqué le sous-al. 613(1)(b)(iii) du *Code* pour maintenir la déclaration de culpabilité malgré ses conclusions selon lesquelles (1) le contre-interrogatoire de l'appelant par le ministère public portant sur sa conduite sexuelle antérieure était inapproprié et «ne pouvait que porter injustement préjudice à l'appelant» et (2) les directives du juge du procès relatives à la preuve d'alibi de l'appelant étaient erronées et causaient un préjudice à l'appelant. Le présent pourvoi vise à déterminer si la Cour d'appel a commis une erreur dans l'application du sous-al. 613(1)(b)(iii) du *Code*.

Arrêt: Le pourvoi est accueilli.

La Cour d'appel a commis une erreur en appliquant le sous-al. 613(1)(b)(iii) du *Code* pour maintenir la déclaration de culpabilité. Le sous-alinéa 613(1)(b)(iii) ne s'applique que lorsqu'une cour d'appel estime que, étant donné une décision erronée sur une question de droit, l'appel pourrait être décidé en faveur de l'appelant, mais qu'elle estime également qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit. En l'espèce, l'omission du juge du procès de limiter le contre-interrogatoire constitue une erreur mixte de fait et de droit et, par conséquent, la déclaration de culpabilité ne pouvait être maintenue par l'application de la disposition. La Cour d'appel, ayant conclu que le contre-interrogatoire abusif portait injustement préjudice à

miscarriage of justice under s. 613(1)(a)(iii) of the Code.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 156, 157, 613(1)(a)(iii), (b)(iii).

APPEAL from a judgment of the Ontario Court of Appeal, dated June 2, 1982, dismissing the accused's appeal from his conviction for gross indecency under s. 157 of the *Criminal Code*. Appeal allowed.

Clayton C. Ruby, for the appellant.

Susan G. Ficek, for the respondent.

The judgment of the Court was delivered by

5157
GROSS
Indecency
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MCINTYRE J.—This is an appeal against the judgment of the Ontario Court of Appeal, dated June 2, 1982, which dismissed the appellant's appeal against his conviction for gross indecency under s. 157 of the *Criminal Code*. The appeal was dismissed by the application of s. 613(1)(b)(iii) of the Code after findings that the cross-examination of the appellant by Crown counsel at trial "could only unfairly prejudice the appellant", and that an error in charging the jury to the effect that "mere disbelief in the alibi evidence could be used as evidence of guilt itself" was wrong and was prejudicial to the accused.

History
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The appellant was charged with committing an act of gross indecency with one Kenneth Jodoin, contrary to s. 157 of the *Criminal Code*, and with indecent assault on Kenneth Jodoin, contrary to s. 156 of the Code (since repealed). He was tried at Hamilton before His Honour Judge Clare and a jury and convicted on both counts. His appeal to the Court of Appeal (Jessup, Brooke and Cory J.J.A.) was allowed in part. The conviction under s. 156 of the Code was quashed but the appeal against the gross indecency conviction under s. 157 was dismissed.

l'appelant, aurait dû accueillir l'appel en vertu du sous-al. 613(1)(a)(iii) du Code pour le motif qu'il s'est produit une erreur judiciaire.

Lois et règlements cités

Code criminel, S.R.C. 1970, chap. C-34, art. 156, 157, 613(1)(a)(iii), b(iii).

POURVOI contre un arrêt de la Cour d'appel de l'Ontario, en date du 2 juin 1982, qui a rejeté l'appel de l'accusé contre sa déclaration de culpabilité de grossière indécence prononcée en vertu de l'art. 157 du *Code criminel*. Pourvoi accueilli.

Clayton C. Ruby, pour l'appelant.

Susan G. Ficek, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE MCINTYRE—Le présent pourvoi est interjeté contre l'arrêt de la Cour d'appel de l'Ontario, en date du 2 juin 1982, qui a rejeté l'appel de l'appelant contre sa déclaration de culpabilité de grossière indécence prononcée en vertu de l'art. 157 du *Code criminel*. L'appel a été rejeté en application du sous-al. 613(1)(b)(iii) du Code après qu'on eut conclu que le contre-interrogatoire de l'appelant par le substitut du procureur général lors du procès [TRADUCTION] «ne pouvait que porter injustement préjudice à l'appelant» et qu'une directive du juge au jury selon laquelle [TRADUCTION] «le simple refus de croire la preuve d'alibi pouvait être utilisé comme une preuve de la culpabilité elle-même» était erronée et portait préjudice à l'accusé.

L'appelant a été accusé d'avoir commis un acte de grossière indécence avec un nommé Kenneth Jodoin, contrairement à l'art. 157 du *Code criminel* et d'avoir attenté à la pudeur de Kenneth Jodoin contrairement à l'art. 156 du Code (abrogé depuis lors). Il a subi son procès à Hamilton devant le juge Clare et un jury et a été déclaré coupable à l'égard des deux chefs d'accusation. Son appel à la Cour d'appel (les juges Jessup, Brooke et Cory) a été accueilli en partie. La déclaration de culpabilité en vertu de l'art. 156 du Code a été annulée mais l'appel interjeté contre la déclaration de culpabilité de grossière indécence en contravention de l'art. 157 a été rejeté.

FACTS

On May 27, 1981, the complainant was attacked in his apartment at about 1:00 a.m. He had been undergoing hormone treatment in preparation for what was described as a "sex-change operation", and was dressed as, and had assumed the appearance of, a woman. He was planning to leave his apartment when he heard a motor vehicle stop in front of the building. He saw a man, whom he later identified as the appellant, enter the building. The man asked Jodoin for a beer. The complainant said he had no beer, but at the visitor's request he allowed entry to his apartment because the visitor wished to use the washroom. When in the apartment the visitor attacked the complainant. There was a struggle and a forced act of fellatio by the complainant. The assailant then left.

There was evidence of identification of the appellant, including evidence relating to his clothing, and also evidence identifying the licence number of the motor vehicle which was correct to within one digit of the licence number of the appellant's vehicle. There was, as found by the Court of Appeal, a very strong circumstantial case against the appellant. The appellant gave evidence on his own behalf. He denied having been the attacker and swore he was not at the complainant's apartment building on that occasion though he had visited another tenant of the block on another occasion. He gave an account of his movements on the night in question, which placed him elsewhere than the scene of the crime and which was supported by witnesses called on his behalf. The jury, having heard all the evidence, clearly disbelieved the appellant and convicted him.

During the trial, Crown counsel (not counsel on this appeal) conducted a repetitive and improper cross-examination of the appellant. The trial judge interfered on two occasions cautioning Crown counsel but did not prevent the continuation of the examination. Evidence of previous sexual conduct of the appellant unrelated to the offence charged had been admitted as part of the Crown's case. The Court of Appeal considered that its admission was improper. The cross-examination dealt exten-

Le 27 mai 1981, vers une heure du matin, le plaignant a été attaqué dans son appartement. Il suivait un traitement hormonal préparatoire à ce qui a été décrit comme une «opération de transformation sexuelle»; il était habillé en femme et en avait pris l'apparence. Il allait sortir de son appartement lorsqu'il a entendu un véhicule s'arrêter devant l'immeuble. Il a vu un homme, qu'il a par la suite identifié comme l'appellant, entrer dans l'immeuble. L'homme a demandé à Jodoin de lui donner une bière. Le plaignant a dit qu'il n'avait pas de bière mais, à la demande du visiteur, il lui a permis d'entrer dans son appartement parce qu'il désirait utiliser les toilettes. Une fois dans l'appartement, le visiteur a attaqué le plaignant. Il y a eu une bagarre et le plaignant a été forcé d'exécuter un acte de fellation. L'agresseur a alors quitté les lieux.

Des éléments de preuve relativement à l'identité de l'appellant ont été présentés, y compris des éléments relatifs à ses vêtements et également des éléments identifiant la plaque du véhicule qui correspondait à un chiffre près au numéro de la plaque du véhicule de l'appellant. Il y avait, comme l'a conclu la Cour d'appel, une preuve circonstancielle très forte contre l'appellant. L'appellant a témoigné pour son propre compte. Il a nié avoir été l'attaquant et a déclaré sous serment qu'il ne se trouvait pas dans l'immeuble du plaignant à ce moment-là, bien qu'il ait rendu visite à un autre locataire de l'immeuble à un autre moment. Il a fait état de ses déplacements au cours de la nuit en question, qui le situaient ailleurs que sur la scène du crime et qui étaient appuyés par des témoins qu'il avait cités. Le jury, après avoir entendu toute la preuve, a clairement refusé de croire l'appellant et l'a déclaré coupable.

Au cours du procès, le substitut du procureur général (qui n'est pas l'avocat dans le présent pourvoi) a contre-interrogé l'appellant de façon répétitive et inappropriée. Le juge du procès est intervenu à deux reprises pour avertir le substitut sans toutefois l'empêcher de continuer l'interrogatoire. Des éléments de preuve relatifs à la conduite sexuelle antérieure de l'appellant, non reliés à l'infraction dont il était accusé, ont été admis dans le cadre de la preuve à charge. La Cour d'appel a

Defense:
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sively with that evidence. The appellant was challenged to explain away or account for the evidence of Crown witnesses, and it is apparent from a reading of the transcript that the appellant became upset and emotionally disturbed by the constant repetition of questions which he had already answered. These facts appear to have led the court to interfere. The Court of Appeal was of the view that the cross-examination was improper. Brooke J.A., with whom Cory J.A. agreed, after noting that the case for the defence depended on the jury's view of the evidence of the appellant and his witnesses to his alibi, said:

As to the cross-examination, while the evidence led in the cross-examination was to some extent relevant to show that the appellant was in the building where the complainant resides and at the hour that she says that he was there, it went too far when the appellant's sexual conduct on another occasion was introduced in the cross-examination and, in particular, when Crown counsel persisted in this regard over the accused's denial. Crown counsel sought and was permitted to lead that evidence which was not really relevant to the issue and could only unfairly prejudice the appellant. Nothing further need be said about the misdirection that mere disbelief in the alibi evidence could be used as evidence of guilt itself. This Court has dealt with such matters on a number of other occasions. The direction was wrong and, of course, was prejudicial to the accused.

He concluded because of the strength of the Crown's circumstantial case it was a proper case for the application of the proviso in s. 613(1)(b)(iii) of the Code.

In this Court it was contended by the appellant that the application of the proviso was improper and that it constituted reversible error. It was contended that the impropriety of the cross-examination raised at most a question of mixed law and fact and, accordingly, it could not be the subject of the application of the proviso. Furthermore, the error found by the Court of Appeal to be "unfairly prejudicial", even if considered an error of law, was not such an error that the proviso should have been applied. The Crown argued that

jugé que cette admission était abusive. Le contre-interrogatoire portait en grande partie sur cette preuve. L'appelant a été mis au défi de se justifier ou de se disculper face aux dépositions des témoins à charge et, à la lecture des notes sténographiques, il ressort que l'appelant a été bouleversé et perturbé émotionnellement par la répétition constante de questions auxquelles il avait déjà répondu. Ces faits paraissent avoir incité la cour à intervenir. La Cour d'appel a estimé que le contre-interrogatoire était inapproprié. Le juge Brooke, avec l'appui du juge Cory, après avoir fait remarquer que la preuve de la défense dépendait de l'opinion que le jury s'était faite des dépositions de l'appelant et de ses témoins relativement à son alibi, a dit:

[TRADUCTION] En ce qui a trait au contre-interrogatoire, bien que les éléments de preuve présentés dans le contre-interrogatoire soient dans une certaine mesure utiles pour démontrer que l'appelant se trouvait dans l'immeuble où réside la plaignante et à l'heure à laquelle elle dit qu'il s'y trouvait, il est allé trop loin lorsqu'il a introduit en contre-interrogatoire la conduite sexuelle de l'appelant à une autre occasion et, en particulier, lorsque le substitut a persisté à cet égard malgré le démenti de l'accusé. Le substitut a cherché à présenter cet élément de preuve qui n'était pas réellement pertinent à l'égard de la question et ne pouvait que porter injustement préjudice à l'appelant et on lui a permis de le faire. Il n'y a rien d'autre à ajouter au sujet de la directive erronée selon laquelle le simple refus de croire la preuve d'alibi pouvait être utilisé comme une preuve de la culpabilité elle-même. Cette Cour a déjà traité de ces questions à plusieurs reprises. La directive était erronée et, évidemment, portait préjudice à l'accusé.

Il a conclu que, à cause de la force de la preuve circonstancielle du ministère public, l'affaire se prêtait à l'application du sous-al. 613(1)(b)(iii) du Code.

Devant cette Cour, l'appelant a soutenu que l'application de la disposition n'était pas appropriée et qu'elle constituait une erreur donnant lieu à cassation. Il a soutenu que le caractère abusif du contre-interrogatoire soulevait tout au plus une question mixte de droit et de fait et que, par conséquent, on ne pouvait lui appliquer la disposition. En outre, l'erreur dont la Cour d'appel a dit qu'elle portait [TRADUCTION] «injustement préjudice» même si elle est considérée comme une erreur de droit, n'était pas telle qu'elle commande-

the impugned cross-examination viewed in the context of the admissibility of evidence did raise a question of law, and one to which the proviso could apply. It was also argued that, apart from questions of admissibility of evidence, the impugned cross-examination could raise questions concerning the fairness of the proceedings. The nature or manner in which cross-examination is conducted does not necessarily raise a question of law to which the proviso may apply, but does raise an issue whether a miscarriage of justice has occurred under s. 613(1)(a)(iii). However, the Court of Appeal, it was said, made no error in law in holding that there had been no miscarriage of justice.

The relevant portions of s. 613 of the *Criminal Code* are set out hereunder:

613. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(a) may allow the appeal where it is of the opinion that

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph

(a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

The proviso may be applied by the Court of Appeal only where it has formed the opinion that the appeal might be decided in favour of the appellant because of a wrong decision on a question of law, and where it is also of the opinion that no substantial wrong or miscarriage of justice has occurred. This is clear from the wording of the statute and, indeed, was accepted by the Crown in its factum.

rait l'application de la disposition. Le ministère public a soutenu que le contre-interrogatoire contesté, considéré dans le contexte de l'admissibilité de la preuve, soulevait bien une question de droit à laquelle la disposition pouvait s'appliquer. Il a également soutenu que, outre les questions d'admissibilité de la preuve, le contre-interrogatoire contesté pouvait soulever des questions relatives à l'équité des procédures. La nature du contre-interrogatoire ou la manière dont il a été mené ne soulève pas nécessairement une question de droit à laquelle peut s'appliquer la disposition, mais soulève en fait la question de savoir s'il y a eu une erreur judiciaire au sens du sous-al. 613(1)(a)(iii). Toutefois, on a dit que la Cour d'appel n'a commis aucune erreur de droit lorsqu'elle a jugé qu'il n'y avait pas eu d'erreur judiciaire.

Les parties pertinentes de l'art. 613 du *Code criminel* sont les suivantes:

613. (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict portant que l'appellant est incapable de subir son procès, pour cause d'aliénation mentale, ou d'un verdict spécial de non-culpabilité pour cause d'aliénation mentale, la cour d'appel

a) peut admettre l'appel, si elle est d'avis

(ii) que le jugement de la cour de première instance devrait être écarté pour le motif qu'il constitue une décision erronée sur une question de droit, ou

(iii) que, pour un motif quelconque, il y a eu erreur judiciaire;

b) peut rejeter l'appel, si

(iii) bien que la cour estime que, pour tout motif mentionné au sous-alinéa a)(ii), l'appel pourrait être décidé en faveur de l'appellant, elle est d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit;

La Cour d'appel ne peut appliquer la disposition que lorsqu'elle est d'avis que l'appel pourrait être décidé en faveur de l'appellant à cause d'une décision erronée sur une question de droit et lorsqu'elle est également d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit. C'est ce qui ressort clairement du texte de la loi et, en fait, ce qui a été accepté par le ministère public dans son mémoire.

The errors at trial were enumerated by Jessup J.A. in his short judgment "for the judge's future guidance". They were stated to be that:

- Trial Errors*
- (1) He charged the jury that mere disbelief of the alibi evidence could be used as evidence of guilt itself.
 - (2) He permitted evidence of the appellant's sexual conduct unrelated to this offence, although it was not similar fact evidence and he permitted the Crown to cross-examine on that evidence.
 - (3) The trial judge erred when he said to the jury "It is your duty to give the benefit of the doubt to the accused, but having done so, to convict if you believe guilt is established."

Le juge Jessup a énuméré les erreurs commises lors du procès dans son bref jugement [TRADUCTION] «à titre d'indication pour le juge». Ce sont les suivantes:

[TRADUCTION]

- (1) Il a exposé au jury que le simple refus de croire la preuve d'alibi pouvait être utilisé comme une preuve de la culpabilité elle-même.
- (2) Il a admis la preuve de la conduite sexuelle de l'appelant qui ne se rapportait pas à la présente infraction, bien qu'il ne s'agissait pas d'une preuve de faits similaires et il a permis au ministère public de contre-interroger à cet égard.
- (3) Le juge du procès a commis une erreur lorsqu'il a dit au jury «Vous avez l'obligation de donner le bénéfice du doute à l'accusé mais, lorsque vous l'avez fait, de le déclarer coupable si vous croyez que la culpabilité est établie.»

Points (1) and (3) are errors of law. Point (2) is the error on which the appellant bases the principle part of his argument. The appellant raises two propositions. He argues, firstly, that the Court of Appeal has found that the abusive cross-examination was unfairly prejudicial to the appellant. The Court of Appeal should, therefore, have allowed the appellant's appeal on the basis that there had been a miscarriage of justice under s. 613(1)(a)(iii). The application of the proviso, it was argued, was reversible error because the Court of Appeal had no power to apply the proviso unless an error of law could be shown. The error in permitting the abusive cross-examination was, at most, one of mixed law and fact and, accordingly, the conviction could not be saved by the application of the proviso. Secondly, the appellant contended that, even if the error with respect to the cross-examination could be considered to be an error of law, it was of such a nature that the Court of Appeal erred in applying the proviso to dismiss the appeal.

Was the failure of the trial judge to restrain the abusive cross-examination an error of law? Of course, a legal element was involved in the decision which faced the trial judge. The question of admissibility of evidence is a question of law. Crown counsel has a right in law to cross-examine the accused and, accordingly, to deny that right or unduly limit it raises considerations of law. There

Les points (1) et (3) sont des erreurs de droit. Le point (2) est l'erreur sur laquelle l'appelant fonde la principale partie de sa plaidoirie. L'appelant soulève deux arguments. En premier lieu, il soutient que la Cour d'appel a jugé que le contre-interrogatoire abusif portait injustement préjudice à l'appelant. Par conséquent, la Cour d'appel aurait dû accueillir son appel sur le fondement qu'il y avait eu erreur judiciaire en vertu du sous-al. 613(1)a)(iii). Il soutient que l'application de la disposition constitue une erreur donnant lieu à cassation parce que la Cour d'appel n'avait pas le pouvoir d'appliquer la disposition à moins qu'une erreur de droit ne puisse être démontrée. L'erreur que constitue l'autorisation du contre-interrogatoire abusif est, tout au plus, une erreur mixte de fait et de droit et, par conséquent, la déclaration de culpabilité ne pouvait être maintenue par l'application de la disposition. En second lieu, l'appelant soutient que, même si l'erreur relative au contre-interrogatoire peut être considérée comme une erreur de droit, elle est d'une telle nature que la Cour d'appel a commis une erreur en appliquant la disposition pour rejeter l'appel.

Le juge du procès a-t-il commis une erreur de droit en n'empêchant pas le contre-interrogatoire abusif? Évidemment, la décision à laquelle le juge du procès était confronté comportait un élément juridique. La question de l'admissibilité de la preuve est une question de droit. Le substitut du procureur général est autorisé en droit à contre-interroger l'accusé et, par conséquent, lui refuser

are, however, limits to the extent of the cross-examination and the manner in which it may be conducted, and there is always a discretion in the trial judge and a duty to confine the cross-examination within proper limits. There is, of course, no doubt that in cross-examination in criminal cases, particularly where questions of credibility of witnesses are in issue, a wide latitude is accorded to counsel and too fine a line should not be drawn to confine or limit a detailed and searching inquiry into the matters raised by the evidence given by the accused and other witnesses. The discretion to intervene in a cross-examination must, of course, be exercised judicially. Its exercise does not rest on legal considerations alone, but will depend as well on the facts and circumstances in each case, and will not be determined by the simple application of a fixed rule of law. The decision to exercise the discretion to intervene in cross-examination, or to refrain from intervention, is one involving considerations of both law and fact and cannot be said to be a question of law alone. Each case will depend on its own circumstances, and no doubt there will frequently be difficulty in deciding from case to case whether the point has arrived in a cross-examination where the trial judge should intervene. It is in this case abundantly clear, however, that that point was reached and passed. The trial judge was obviously concerned at the course the cross-examination was taking. He did intervene on at least two occasions to caution counsel and to attempt to restrict counsel within proper limits, but this did not affect the cross-examination in any significant way. That he was in error in this regard was found by the Court of Appeal and it was noted by Brooke J.A. that it "could only unfairly prejudice the appellant".

Held

The Court of Appeal, despite its finding of prejudice, relied on the provisions of s. 613(1)(b)(iii) of the *Criminal Code*. It applied the proviso to dismiss the appeal. In this, it is my view that they were in error. Section 613(1)(b)(iii) permits of the application of the proviso only where it is of the opinion that on the ground of a wrong decision on a question of law an appeal

ce droit ou le restreindre indûment soulève des considérations de droit. Toutefois, il y a des limites à l'étendue du contre-interrogatoire et à la manière dont il peut être mené; le juge du procès possède toujours un pouvoir discrétionnaire et l'obligation de maintenir le contre-interrogatoire dans des limites acceptables. Évidemment, il n'y a aucun doute que lors de contre-interrogatoires dans des affaires criminelles, particulièrement lorsque des questions de crédibilité des témoins sont en cause, le procureur dispose d'une grande latitude et il ne faudrait pas tracer une frontière trop précise pour restreindre ou limiter un interrogatoire détaillé et rigoureux sur des points soulevés dans les dépositions de l'accusé et d'autres témoins. Le pouvoir discrétionnaire d'intervenir dans un contre-interrogatoire doit, il va sans dire, être exercé avec discernement. Son exercice ne repose pas seulement sur des considérations juridiques, mais dépend également des faits et des circonstances de chaque affaire et ne sera pas déterminé par la simple application d'une règle de droit établie. La décision d'exercer ou non le pouvoir discrétionnaire d'intervenir dans un contre-interrogatoire comporte des considérations de droit et de fait et on ne peut dire qu'il s'agit seulement d'une question de droit. Chaque affaire dépendra de ses propres circonstances et il sera sans doute fréquemment difficile de décider d'une affaire à l'autre si, dans un contre-interrogatoire, on est parvenu au point où le juge du procès devrait intervenir. Toutefois, en l'espèce, il est évident que ce point a été atteint et même dépassé. Le juge du procès était manifestement préoccupé par le déroulement du contre-interrogatoire. Il est intervenu à au moins deux reprises pour mettre en garde le substitut et pour tenter de le garder dans des limites appropriées, mais cela n'a eu aucun effet important sur le contre-interrogatoire. La Cour d'appel a conclu qu'il avait commis une erreur à cet égard et le juge Brooke a fait remarquer que cela [TRADUCTION] «ne pouvait que porter injustement préjudice à l'appellant».

Tout en concluant au préjudice, la Cour d'appel s'est fondée sur les dispositions du sous-al. 613(1)(b)(iii) du *Code criminel*. Elle a appliqué la disposition pour rejeter l'appel. À cet égard, je suis d'avis qu'elle a commis une erreur. Le sous-alinéa 613(1)(b)(iii) ne peut s'appliquer que lorsque la cour estime que, étant donné une décision erronée sur une question de droit, l'appel pourrait être décidé

might be decided in favour of the appellant, but it is also of the opinion that no substantial wrong or miscarriage of justice has occurred. Here no error of law alone is relied upon, and the error in failing to limit the cross-examination may not be relieved against by the application of the proviso. Prejudicial error had been found and the appellant, in my view, was entitled to have the court consider whether the appeal should have been allowed under the provisions of s. 613(1)(a)(iii) of the Code on the ground that a miscarriage of justice had occurred.

What is a miscarriage of Justice

I find it impossible to conclude that no miscarriage of justice occurred as a result of the appellant's cross-examination. A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice. It is not every error which will result in a miscarriage of justice, the very existence of the proviso to relieve against errors of law which do not cause a miscarriage of justice recognizes that fact. However, I am not able to say that an error which, in the words of Brooke J.A., "could only unfairly prejudice", would not by itself cause a miscarriage of justice. It would be wholly inconsistent with a finding of unfair prejudice in a trial to find, nonetheless, that no miscarriage of justice occurred. In my opinion, the Court of Appeal, having found as it did, ought to have allowed the appeal under s. 613(1)(a) (iii) of the *Criminal Code*. For these reasons, s. 613(1)(b)(iii) of the *Code* could not influence the decision and further exploration of that section in dealing with the second or alternative argument raised by the appellant is unnecessary.

I would allow the appeal.

Appeal allowed.

Solicitor for the appellant: Clayton C. Ruby, Toronto.

Solicitor for the respondent: The Attorney General for the Province of Ontario, Toronto.

en faveur de l'appelant, mais qu'elle estime également qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit. En l'espèce, on ne s'est pas fondé sur une erreur de droit seulement et on ne peut, par l'application de la disposition, corriger l'erreur qui résulte de l'omission de limiter le contre-interrogatoire. On a conclu qu'il y avait eu une erreur causant un préjudice et, à mon avis, l'appelant avait le droit d'exiger que la cour examine la question de savoir si l'appel aurait dû être accueilli en vertu des dispositions du sous-al. 613(1)(a)(iii) du *Code* pour le motif qu'il s'est produit une erreur judiciaire.

J'estime qu'il est impossible de conclure que le contre-interrogatoire de l'appelant n'a entraîné aucune erreur judiciaire. Une personne qui est accusée d'un crime a droit à un procès équitable selon la loi. Toute erreur qui se produit au cours du procès et qui prive l'accusé de ce droit constitue une erreur judiciaire. On ne peut pas dire que toute erreur est une erreur judiciaire; d'ailleurs l'existence même de la disposition pour remédier aux erreurs de droit qui ne causent pas une erreur judiciaire reconnaît ce fait. Toutefois, je ne peux pas dire qu'une erreur qui, selon les termes du juge Brooke [TRADUCTION] «ne pouvait que porter injustement préjudice» ne serait pas en elle-même une erreur judiciaire. Il serait tout à fait incompatible avec une conclusion selon laquelle il y a eu un préjudice injuste dans un procès que de conclure néanmoins qu'il ne s'est produit aucune erreur judiciaire. À mon avis, la Cour d'appel ayant conclu comme elle l'a fait aurait dû accueillir l'appel en vertu du sous-al. 613(1)(a)(iii) du *Code criminel*. Pour ces motifs, le sous-al. 613(1)(b)(iii) du *Code* ne peut pas avoir d'effet sur la décision et il est inutile d'examiner plus avant cet article dans le contexte du second argument de l'appelant ou argument subsidiaire.

Je suis d'avis d'accueillir le pourvoi.

Pourvoi accueilli.

Procureur de l'appelant: Clayton C. Ruby, Toronto.

Procureur de l'intimée: Le procureur général de la province de l'Ontario, Toronto.

CHAPTER P-39

PUBLIC INQUIRIES ACT
cited as
R.S.N.S., 1967, Chapter 250

Inquiry

1 The Governor in Council may whenever he deems it expedient cause inquiry to be made into and concerning any public matter in relation to which the Legislature of Nova Scotia may make laws. R.S., c. 250, s. 1.

Commissioner

2 In case such inquiry is not regulated by any special law, the Governor in Council may appoint a person or persons as a commissioner or commissioners to inquire into and concerning such matter. R.S., c. 250, s. 2.

Witnesses and Evidence

3 The commissioner or commissioners shall have the power of summoning before him or them any persons as witnesses and of requiring them to give evidence on oath orally or in writing (or on solemn affirmation if they are entitled to affirm in civil matters), and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which he or they are appointed to inquire. R.S., c. 250, s. 3.

Powers, Privileges, Immunities

4 The commissioner or commissioners shall have the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and produce documents and things as is vested in the Supreme Court or a judge [Judge] thereof in civil cases, and the same privileges and immunities as a judge [Judge] of the Supreme Court of Nova Scotia. R.S., c. 250, s. 4.

Council of Maritime Premiers

5 (1) The Governor in Council may vest in any board,

commission, tribunal or other body or person established or appointed by, under or in relation to the Council of Maritime Premiers for the purpose of studying, investigating or hearing and determining any matter of common concern among the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, all of the powers and privileges that a commissioner under this Act has.

Jurisdiction

(2) The powers and privileges vested pursuant to subsection (1) may be exercised by the board, commission, tribunal or other body or person in relation to persons, organizations and documents resident or situated within Nova Scotia wherever the study, investigation or hearing is conducted or held within the region comprised of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island. 1973, c. 53, s. 1.

MAR 14 1988



DALHOUSIE LAW SCHOOL HALIFAX CANADA B3H 4H9

C O N F I D E N T I A L

DATE: March 14, 1988

TO: W. Wylie Spicer, Counsel, The Royal Commission on the Donald
Marshall Junior Prosecution

FROM: Archie Kaiser

SUBJECT: Compensation for Wrongful Conviction and Imprisonment: Quantum,
Principles, Factors and Process

Following our telephone conversation of Friday, March 11, I reviewed some of any materials with a view to assisting you in your preparation for your examination of Mr. Giffin. Obviously, there was very little time available to properly advise you on the issues which might arise during the testimony of this witness, but I am sending along these brief notes anyway.

A. Quantum

I attach a table where I have noted a few awards, both recent and as far back as 1905. The examples should be studied with caution. They are largely drawn from the U.S. and U.K. experience and I make no claim that this is anything near an exhaustive list. The rules, such as they are, in the U.K. are based upon various ministerial statements and provide for ex gratia payments. The American cases vary widely as far as the basis of claim is concerned. Until recently, many states passed a moral obligation bill which was quite fact-specific and which would provide for the state agreeing that a cause of action could be brought against it in the courts. There are contemporary examples (e.g. New York) giving a legislative entitlement to compensation. Beyond these differences in the mechanism of compensation being paid, there are important distinctions in the legal systems and economic conditions among the various countries which could make

W. Wylie Spicer
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a simple foreign exchange conversion quite misleading.

None the less, you may learn something from my short list. The Quantum of awards has not been a matter of great interest for me, dwelling as I have been on broader issues.

B. Principles

Any compensation scheme (or for that matter, any decision on an individual case in the absence of a scheme) must have some basic set of principles as a foundation for the assessment of the individuating factors which must be considered before an award can be made. It would, of course, be possible to merely set an arbitrary formula similar to that found in some workers' compensation programs, for example, \$10,000 per year for the first three years of imprisonment and \$15,000 thereafter. In the same vein, there could be a ceiling on awards, regardless of the length or conditions of imprisonment or the effect on the life of the wrongfully convicted person.

However, there are far stronger arguments (and ample precedent) for full compensation for the injured party. Simple restitutionary principles should form the baseline for any award: the victim should be restored to the economic position he would enjoy if not for the wrongful act of the state. Beyond that, given the seriousness of convicting the innocent (it has often been said to be among the gravest problems with which a civilized society can concern itself) the idea of full compensation, on a fair and reasonable basis, is dominant in the little academic writing in the field and in many current legislative developments. Taking this stance inevitably means the rejection of any mechanistic formula or artificial ceiling and may mean that large sums ought to be paid to those who have been treated worst

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by the criminal justice system - innocent people who have been found guilty and served long terms of imprisonment.

Out of interest, although the Federal-Provincial Task Force does not make a recommendation on the full compensation/no ceiling issue, they seem to be heading in the right direction, by their identification of arguments, at pp. 33-34.

The Thomas Royal Commission seems to have understood these issues and I note a few extracts from pp. 115-116.

"This Commission is privileged to have been given the task of righting wrongs done to Thomas, by exposing the injustice done to him by manufactured evidence. We cannot erase the wrong verdicts or allow the dismissed appeals."

"Quite apart from the various indignities and loss of civil rights associated with his deprivation of liberty, we consider he will for the rest of his life suffer some residual social disabilities attributable to the events of the last 10 years." [Emphasis added]

"We now consider the amount of compensation to be awarded to him to compensate him for all the damage, suffering, and anguish he has sustained mentally and physically as a consequence of his wrongful convictions and subsequent years in prison."

C. Factors

I am here going to address only a limited range of variables which ought to be considered in giving effect to the principles discussed above. I have drawn my rough list from several sources (citations available) and have amplified it in some areas which may be of interest to you in examining Mr. Giffin (and elsewhere). I am assuming that a person entitled to compensation would have been (i) convicted, (ii) imprisoned, (iii) pardoned or found not guilty on a reference, and (iv) a person who did not commit the

acts charged in the accusatory instrument. Any purported blameworthiness of his or her conduct will be addressed separately.

1. Non-Pecuniary Losses

- (i) loss of liberty, which may be particularized in some of the following heads; indeed some overlap is inevitable;
- (ii) loss of reputation;
- (iii) humiliation and disgrace;
- (iv) pain and suffering;
- (v) loss of enjoyment of life;
- (vi) loss of potential normal experiences, such as starting a family;
- (vii) other foregone developmental experiences, such as education or social learning in the normal workplace;
- (viii) loss of civil rights, such as voting;
- (ix) loss of social intercourse with friends, neighbours and family;
- (x) physical assaults while in prison by fellow inmates or staff;
- (xi) subjection to prison discipline, including extraordinary punishments imposed legally (the wrongfully convicted person might, understandably, find it harder to accept the prison environment), prison visitation and diet;
- (xii) accepting and adjusting to prison life, knowing that it was all unjustly imposed;
- (xiii) adverse effects on future advancement, employment, marriage, social status, physical and mental health and social relations generally;
- (xiv) any reasonable third party claims, principally by family, could be paid in trust or directly; for example, the other side of (ix) above is that the family has lost the association of the inmate.

Surely few people need to be told that imprisonment in general has very

serious and quite detrimental effects on the inmate, socially and psychologically. For the wrongfully convicted person, these harmful effects are heightened exponentially, as it is never possible for the sane innocent person to accept not only the inevitability but the justice of that which is imposed upon him. The above list is intended to add some specificity to the mainly non-pecuniary category which it reflects. For the person who has been subjected to a lengthy term of imprisonment, we approach the worst case scenario. The notion of permanent social disability due to a state wrong begins to crystallize. The point is that prison, for many, teaches a very maladjusted way of being for life outside the institution and that the longer this distorting experience goes on, the less likely a person can ever be whole again. Especially for the individual imprisoned as a youth, the chances of eventual happy integration into the normal community (which by the way sent the accused to jail unfairly in the first place) must be very slim. Therefore, beyond the factors noted in this section, special levels of compensation need to be considered for this likely chronic social handicap.

2. Pecuniary Losses

There will be considerable variability here, reflecting in part the person's skills and employability at the time of incarceration. One should be cautious in this regard, however, in assessing compensation, for it may be that the wrongfully convicted person's pre-existing marginality contributed to his or her being found guilty and kept in prison. If full compensation is one of the guiding principles, then each claimant should be given the benefit of the doubt on what his or her life would have held out

but for the mistaken conviction.

Some headings might include:

- (i) loss of livelihood;
- (ii) loss of employment related benefits, such as pension contributions by employer;
- (iii) loss of future earning ability;
- (iv) loss of property due to incarceration or foregone capital appreciation;
- (v) legal expenses, in connection with the original trial and appeal, subsequent appeals or special pleas, any new trial or reference, and the compensation application itself. Most awards add the legal expenses, presumably on the belief that the wrongfully convicted person should not have to pay to secure his or her release and redress when he or she is the victim. A fortiori, when the imprisonment is long, the new evidence elusive or the authorities recalcitrant;
- (vi) expenses incurred by friends and family; for example, in visiting the prisoner or securing his or her release, perhaps to be paid in trust for them or directly to them.

3. Blameworthy Conduct

Most compensation schemes envisage some reduction or exclusion for the person who has contributed to or brought about his or her own conviction. The obvious example would be the person who eagerly but fancifully confesses to a crime for which he or she was not responsible. Even there, caution is in order, for the criminal justice system is supposed to find the truth of allegations, even if the accused has been partly to blame for a particular falsehood or an atmosphere of untruth. Further, there is great imprecision in many statements to the effect that "the accused is the author of his or her own fate". How often can anyone confidently say that the accused's conduct is to be held to account to the tune of a 10% reduction of the total

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award? Finally, the spectre of the state simultaneously thereby evading and projecting responsibility, in effect scapegoating and blaming the victim for its errors, must loom large in the mind of any conscientious person when it comes to assessing the relevance of the victim's behaviour.

By all means, some escape hatch should be reserved for the fraudulent victim or the reckless participant in a criminal trial, but this feature of a compensation scheme (or award) should not be used to punish the naive, the youthful, the feeble-minded, the powerless or the frightened, among others.

Actual awards seldom recite specifically why (or if) they may have been reduced due to this type of factor. Again, if fairness and reasonableness are the bywords and full compensation the desired end, the state should err on the side of generosity. Meanness, vindictiveness, small-mindedness, or intellectual laziness should not allow the importance of the victim's conduct to be overblown.

D. Process

You have not asked me to address this issue, so I will comment upon it very briefly. The fundamental point is that, in the absence of a statutory scheme, can there and ought there to be guidelines for the submission of an ex gratia claim? The answer must be an emphatic yes, if the state is accepting its responsibilities, moral and legal, in a bona fide manner. This provision of mere guidelines is by no means adequate to meet the obligations of a signatory to the International Covenant, but is a step in the direction of procedural fairness and basic decency.

I am not sure whether this was done in the Marshall case, but it ought to have been the first step of the Attorney-General once a decision had been

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March 14, 1988
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made to compensate. Materials would have been readily available, especially from the U.K. and adaptations could have readily been made for the Canadian environment and the facts at hand. If this were not done, then one in the position of Marshall would be left with trying to figure out the bases for a relatively unprecedented claim, with no indication by the government of how it has determined that it should discharge its moral and international legal obligations. The process could readily become a conventional cat and mouse bargaining game which is certainly not the proper spirit for the settlement of such issues.

I attach some recent British materials in the nature of an Explanatory Note to Claimants and a subsequent Ministerial statement. It is by no means ideal, but is much better than nothing.

There are many other "process" issues which could be addressed in this case, no doubt, but I am not now aware of the specific facts.

Best of luck in your examination. I am at your service.

AK/lmr
Attachments

CASE / PLACE / DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL & OTHER COSTS	REDUCTION FOR...?	OTHER ISSUES	MISC. NOTES incl. SOURCE
GB / 80 (likely "great case" Medal)	\$18000	?	16 mos	\$8000 re-appeal fee \$5000 ind. compensation				22 Dec 86 Off. Ashman
USA / 84 Tolson GETER	Suit \$2 million	cont. suit	19 mos / 1987					ABHT Jan 86
USA / ? Tolson FORBES	\$250K award \$1.2 mil penalty re-appeal	"	5 yrs max	- ex-husband living - 4 yrs in prison - 1000000 in 1951 - 1000000 in 1951	included			"
USA / 80 Grenoble Ding (Marty?)	\$1 mil	civil suit - 1000000	2 1/2 yrs cont. monitor	- out-of-pocket - structural damages				3 New LJ 19 Dec 15/80 (in Dec 80) -> P. 107 (book)
USA / 1946 Campbell	\$115K	normal litigation bill; then suit	?; long term	- less savings & - prior history - suffering & effects of long term				Releg CR @ Wash. 202
USA / Zimmerman NY	\$1 mil in bill Cash for bill	normal litigation bill; then suit	7 1/2 yrs in prison		80 much of \$500K deducted from normal \$1 mil		within 2000 yr award; bill 500K after getting it; best payment that protected investment 44 1111	④ 204 + ⑤
USA / Dalko NY	45K	cont. litigation award & temp.	4 days	advance doc.				⑤
NZ / Thomas	\$1.1 mil NZ							
UK / 1985 BECK	\$4K	neg	7 yrs				part. id.	judicial 1982 Report ✓
UK / 1928 BLANCK	\$10K	"	18 1/2 yrs monitor				didn't comment	"
" / 1955 Lenny dial	\$300-400	"	2 yrs exp. 0.					
" / 1965 Gross dial	\$500-1000	"	5 yrs				money id.	
" / 1974 Viny dial	\$17.5K	"	5 yrs					
1977 Morton	\$5 CV		5 yrs monitor					

CASE / PLACE / DATE	AWARD	METHOD	IMPRISONMENT	FACTORS	LEGAL & OTHER COSTS	REDUCTION FOR ... ?	OTHER ISSUES	MISC. NOTES incl. SOURCE
Dougherty / UK / 75	£2K	eg	6 mos / 1/2 yr					Justice 82 ↓
Naughton / UK / 77	£10K	"	3 yrs / not long				admin. dist'd	"
Benjamin / UK / 76	£9K	"	1 yr / 1/2 yr → not sound					
Tealby / 1179 / UK	£21K	"	5 yrs / 1 yr					
Price / 21982	£70	"	? / 1 yr					
Stevens / 76	£8.5K	"	3 yrs / robbery (out of)					
Burke / 80	£7.0K	"	18 mos / 1 yr					
Daniels / USA 1985	\$600K	kind grant; added	6-18 yrs 30% cost sentenced 4	Report contains Dane factors see exp. p. 11 p. 194 - proposals + comparative revisions				Hoff ⑤ 538
Warwick / Fox Canada 1986	£275K	eg	8 of 10 yrs for exp	limited liability by other inmates as per off.				
Howard / USA Illinois 1985	\$51K	special bill	17 yrs sentenced for murder				5100K deduction for nature of prison exp	

Friday, 29th November, 1985.

Written No. 173

Mr. Tim Smith (Beaconsfield): To ask the Secretary of State for the Home Department, if he will make a statement with regard to the payment of compensation to persons who have been wrongly convicted of criminal offences.

MR. DOUGLAS HURD

There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted Free Pardons by the exercise of the Royal Prerogative of Mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction.

In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a Free Pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following the reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I shall be prepared to pay compensation to all such persons where this is required by our international obligations. The International Covenant on Civil and Political Rights [Article 14.6] provides that: "When a person has by a final decision been convicted of a criminal offence and when subsequently

/ his

his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of Justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.

There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought.

It has been the practice since 1957 for the amount of compensation to be fixed on the advice and recommendation of an independent assessor who, in considering claims, applies principles analogous to those on which claims for damages arising from civil wrongs are settled. The procedure followed was described by the then Home Secretary in a written reply to a Question in the House of Commons on 29th July 1976 (Official Report, columns 328-330). Although successive Home Secretaries have always accepted the assessor's advice, they have not been bound to do so. In future, however, I shall regard any recommendation as to amount made by the assessor in accordance with those principles as binding upon me. I have appointed Mr Michael Ogden QC as the assessor for England and Wales.

7 He

He will also assess any case which arises in Northern Ireland where my rt. hon. Friend the Secretary of State for Northern Ireland intends to follow similar practice.

HOME OFFICE LETTER TO CLAIMANTS

*EXPLANATORY NOTE**EX GRATIA PAYMENTS TO PERSONS WRONGLY CONVICTED OR CHARGED:**PROCEDURE FOR ASSESSING THE AMOUNT OF THE PAYMENT*

1 A decision to make an *ex gratia* payment from public funds does not imply any admission of legal liability; it is not, indeed, based on considerations of liability for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages.

2 Subject to Treasury approval, the amount of the payment to be made is at the direction of the Home Secretary, but it is his practice before deciding this to seek the advice of an independent assessor experienced in the assessment of damages. An interim payment may be made in the meantime.

3 The independent assessment is made on the basis of written submissions setting out the relevant facts. When the claimant or his solicitor is first informed that an *ex gratia* payment will be offered in due course, he is invited to submit any information or representations which he would like the assessor to take into account in advising on the amount to be paid. Meanwhile, a memorandum is prepared by the Home Office. This will include a full statement of the facts of the case, and any available information on the claimant's circumstances and antecedents, and may call attention to any special features in the case which might be considered relevant to the amount to be paid; any comments or representations received from, or on behalf of, the claimant will be incorporated in, or annexed to, this memorandum. A copy of the completed memorandum will then be sent to the claimant or his solicitor for any further comments he may wish to make. These will be submitted, with the memorandum, for the opinion of the assessor. The assessor may wish to interview the claimant or his solicitor to assist him in preparing his assessment and will be prepared to interview them if they wish. As stated in paragraph 2 above, the final decision as to the amount to be paid is a matter entirely for the Home Secretary.

4 In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the conviction and/or loss of liberty, and any or all the

following factors may thus be relevant according to circumstances:—

Pecuniary loss

Loss of earnings as a result of the charge or conviction.

Loss of future earning capacity.

Legal costs incurred.

Additional expense incurred in consequence of detention, including expenses incurred by the family.

Non-pecuniary loss

Damage to character or reputation.

Hardship, including mental suffering, injury to feelings and inconvenience.

The assessment will not take account of any injury a claimant may have suffered which does not arise from the conviction (eg as a result of an assault by a member of the public at the scene of the crime or by a fellow prisoner in prison) or of loss of earnings arising from such injury. If claims in respect of such injuries are contemplated, or have already been made to other awarding bodies (such as the courts or the Criminal Injuries Compensation Board), details should be given and included in the memorandum referred to in paragraph 3.

When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation. In submitting his observations a solicitor should state, as well as any other expenses incurred by the claimant, what his own costs are, to enable them to be included in the assessment.

5 In considering the circumstances leading to the wrongful conviction or charge the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed to by the accused person's own conduct. The amount offered will accordingly take account of this factor, but will not include any element analogous to exemplary or punitive damages.

6 Since the payment to be offered is entirely *ex gratia*, and at his discretion, the Home Secretary is not bound to accept the assessor's recommendation, but it is normal for him to do so. The claimant is equally not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstances of his prosecution or conviction, or his detention in either or both of these connections.

09-84-0258-01



**House of Assembly
Nova Scotia**

P. O. Box 877
Kentville, N. S.
B4N 4H8



January 23, 1984

ATTORNEY GENERAL

Hon. Ron Giffin
Attorney General
Province of Nova Scotia
Halifax, N. S.

Dear Sir:

Enclosed is a photocopy of my letter to the editor of the Kentville Advertiser in December 1983 regarding the Donald Marshall case. Enclosed also is a photocopy of the Donham column which prompted my letter.

Yours very truly,

Edd W. Twohig, M.L.A.
Kings North

hlh
Enc.

NOV 1983

Giffin's moral duty is clear

Comment



**Parker Barss
Donham**

There were other inexplicable lapses in the police investigation. The dead boy's body was never subjected to an autopsy. No photographs were taken. No murder weapon was discovered, although when the case was re-opened in 1982, the murder weapon turned up quickly.

Apologists for the system's handling of the Marshall case contend that on the night of the Seale boy's death, Marshall and Seale were attempting to rob Roy Newman Ebsary, the man who has now been convicted of killing Seale. The most public exponent of this view has been the Appeals Division of the Supreme Court of Nova Scotia, whose infamous decision acquitting Marshall last spring included the incredible statement that "any injustice is more apparent than real" because Marshall was "partly the author of his own misfortune."

The Supreme Court overlooked the fact that Marshall has never been convicted of this alleged attempted robbery. He has never even been charged with it. He is entitled to a presumption of innocence. There is not a shred of evidence to suggest that the police investigation would have taken a different course had Marshall owned up to an attempted robbery.

On the contrary, there is much that suggests police were determined to pin the crime on Marshall, no matter how much contrary evidence presented itself. It's this suspicion that needs to be aired at a public inquiry.

Men in positions of great power do not like to see the system of which they are pillars called to account. The Supreme Court has gone far out of justice's way to offer the province an escape from its responsibilities in the Marshall case.

Ron Giffin should resist the temptation to take his easy way out. He will never be confronted with a clearer moral choice.

(Parker Barss Donham welcomes comments in his columns. You can write him at R.R. 1, Box 88, Bras d'Or, Nova Scotia, B0C 1B0.)

Nova Scotia new attorney Giffin, has had a month to consider what the province will do for Donald Marshall Jr., the Micmac Indian who spent 11 years in prison for a murder someone else committed.

The choice confronting Giffin is straight forward: He can accept the province's obligation to correct this grotesque injustice, or he can follow Ottawa's example and try to sleaze out of his responsibility on the strength of dubious technicalities.

Three steps are necessary to balance the province's moral ledger. Marshall must be reimbursed for the \$82,000 in legal expenses he incurred overturning the original, unjust verdict. He and his family must be compensated financially for 11 lost years. And the circumstances surrounding his imprisonment must be subjected to a full impartial, public inquiry.

The last of these obligations will be the hardest for the province to accept, since it will entail public censure for the officials who handled Marshall's case. Men in positions of authority customarily close ranks in situations of this sort, especially white men when the aggrieved is an Indian.

Much is already known about the events surrounding Marshall's original trial. He was convicted on the testimony of two eyewitnesses who claimed to have seen him stab 16-year-old Sandy Seale, and a third witness whose account of Marshall's movements on the night of the murder fitted the police version of the incident.

All three witnesses have since recanted their testimony. All say they were pressured by police into giving false evidence.

Ten days after Marshall's conviction, a man walked into the Sydney Police station and identified the real killer. His description of events closely matched Marshall's account. But when the RCMP instituted a second investigation on the basis of this evidence, they did not re-interview a single one of the witnesses who had testified at Marshall's trial. Nor did they notify defense lawyers that the new witness had come forward, despite the fact that an appeal was underway.

DEC 1983

Letters

Columnist didn't think clearly

Dear Sir:

The shrill cry for moral responsibility in your recent "Comment" column (Parker Barss Donham) reflects the commentator's failure to follow the most basic of moral tenets: to think clearly.

Some journalists feel that freedom of the press, unlike freedoms of other kinds, does not also require responsibility. If the commentator's column is not irresponsible by its failure to present a balanced position, then it does reflect lack of reason. Although I have given much thought to the Marshall case, I have not been able to come to such clear-cut conclusions as your commentator would lead us to believe he has.

We do not live in the Kingdom of God. What we live in is a society created by humans in an attempt to serve all members of that society. We should always strive for perfection, knowing, however, that we will never reach it. Is it society's obligation to single Donald Marshall out for financial remuneration?

There are others who have suffered the imperfections of our society. Maybe as a price for the good we receive from society we must each take

our chances with the bad. If our reason tells us that our responsibility as members of society do go further than establishing the rules of society, how do we quantify that responsibility to any one individual?

During my lifetime, I have heard a few concerns, and fewer confirmations, of innocent people being convicted. However, one hears continuous complaints that our system seems to favor the criminal. I do not feel that we, as members of society, should need to bear guilt because our judicial system allows the conviction of Donald Marshall for a crime he did not commit. The problem would appear to lie not with the system, but with human frailties.

I believe there is merit in the idea of having an investigation of the circumstances to determine the degree of responsibility that could be attributed to the actions of those persons who allowed our system not to work properly. Any responsibility or damages that might be determined should not be a charge against the taxpayers of Nova Scotia unless the system itself is found at fault.

A monetary loss should

first be determined and the percentage of blame for this loss should be attributed to those responsible. There can be no doubt that Donald Marshall would need to bear some proportion of the liability. A percentage could be attributed to the fact that his original intent to carry out a crime started the whole chain of events. Another percentage would need to be allowed for his failure to give true evidence at his trial.

The percentage of liability to the various policeman and members of the judicial system for any failure to carry out their duties properly and with impartiality would have to be quantified. If it could be established that society as a whole had failed to establish proper controls and systems, a percentage might be allocated to all taxpayers. This procedure would determine who should be responsible for the monetary costs and damages.

What are the costs and damages? Certainly, Donald Marshall spent longer in prison than for the robbery attempt that started it all. His lost earnings for that extra time would need to be determined. The costs to taxpayers for police costs,

court costs, and prison costs would have to be included since they would not have been incurred except for the murder and subsequent events.

An accumulation of all these costs and damages distributed among those who could be determined to have acted wrongly might provide some very good information on the costs of crime. The percentages of costs could be distributed to false testimony by eye-witnesses, policemen for pressuring the giving of false evidence, police responsibility for an improperly conducted second investigation, lapses in police investigation, any others who might bear a per cent of responsibility including, of course, Donald Marshall himself.

On a daily basis I am aware of difficulties, hardships and injustice, real or imagined, suffered by many in our society. But what I see, hear, and read that is going on in most of the rest of the world is worse. We can only strive to do better.

Journalists who present incomplete, inaccurate or biased commentary do more to increase our problems than to decrease them.

Edd W. Twohig, M.L.A.
Kings North

Susan

Compensation

NOV 21 1988

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November 16, 1988

Mr. Wiley Spicer
Commission Counsel
Royal Commission on the Donald
Marshall, Jr., Prosecution
Maritime Centre
1505 Barrington Street
Suite 1026
Halifax, Nova Scotia
B3J 3K5

Dear Wiley:

Here is a copy of a very recent English case that I thought would be of interest to you. You might want to share it with the Commissioners as you contemplate the need for more clearly defined rules and procedures for the payment of compensation to those who are deserving.

I hope you find it useful.

Sincerely,



Marlys Edwardh

ME:jp

R v Secretary of State for the Home Department, ex parte Harrison

QUEEN'S BENCH DIVISION
STUART-SMITH LJ AND FARQUHARSON J
19, 20 MAY 1988

Crown — Prerogative — Ex gratia payments to persons imprisoned but subsequently acquitted — Whether Secretary of State required to give reasons for refusing to make ex gratia payments.

The applicant was charged with conspiracy to defraud over the running of a co-operative of vegetable growers. After spending over £9,000 on his defence he ran out of funds and applied to the Crown Court for legal aid, which was granted on condition that the applicant pay £1,500 towards his costs. The applicant was unable to meet that condition and represented himself at the trial. He was convicted and sentenced to three years' imprisonment, reduced on appeal to one year, which the applicant served. On a further appeal out of time the Court of Appeal held that the Crown Court had been wrong to refuse the applicant legal aid and, having regard to the way the case had been presented in the Crown Court, the applicant's appeal was allowed and his conviction quashed. The applicant applied to the Secretary of State for compensation for the term of imprisonment he had served, but the Secretary of State refused his request without giving reasons. The applicant sought, *inter alia*, an order of certiorari quashing the Secretary of State's decision, contending that the Secretary of State had kept confidential the criteria on which he had based his decision to refuse compensation and that the applicant ought to have had that information available to him so that he could make representations on his own behalf.

Held — Since *ex gratia* payments to persons who had been imprisoned but subsequently acquitted were made under the royal prerogative, the Secretary of State was not obliged to give reasons for refusing to make such a payment. In the circumstances and in the absence of any suggestion that the Secretary of State had acted in a biased or fraudulent manner, the application would be refused (see p 90 *f* to *h*, p 91 *h*, *j*, p 92 *h*, *j*, p 93 *b* *c* and p 94 *b* to *d*, *post*).

Dictionum of Megarry V.C. in McInnes v Onslow Fane [1978] 3 All ER 211 at 223 applied.

Notes

For powers of pardon under the royal prerogative, see 8 Halsbury's Laws (4th edn) paras 949–951, and for cases on the subject, see 11 Digest (Reissue) 684–686, 179–207.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1

KB 223, CA.

McInnes v Onslow Fane [1978] 3 All ER 211, [1978] 1 WLR 1520.

R v Immigration Appeal Tribunal, ex p Khan [1983] 2 All ER 420, [1983] QB 790, [1983] 2 WLR 759, CA.

Cases also cited

A-G of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346, [1983] 2 AC 629, PC.

R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett (1987) Independent, 4 December.

Application for judicial review

Joseph Harrison applied, on a renewed application with leave of the Court of Appeal given on 23 March 1987, for (i) an order of certiorari to quash the decision of the respondent, the Secretary of State for the Home Department, made on 3 February 1986 whereby he refused the applicant's application for an *ex gratia* payment by way of compensation for a term of imprisonment served by the applicant between 14 October 1982 and 10 October 1983, (ii) an order of mandamus requiring the Secretary of State to assess and pay an *ex gratia* payment, and (iii) to remit the matter back to the Secretary of State. The facts are set out in the judgment of Farquharson J.

Peter Martin for the applicant.
John Laws for the Secretary of State.

FARQUHARSON J (delivering the first judgment at the invitation of Stuart-Smith LJ). This is a motion for judicial review of a decision by the Secretary of State of the Home Department made on 3 February 1986 whereby he refused the application for an *ex gratia* payment made by the applicant by way of compensation for a term of imprisonment which he served between 14 October 1982 and 10 October 1983.

To establish the background of the case and the circumstances in which this application to the Home Secretary was made, it is necessary to look at the facts. In May 1980 the applicant became concerned in the running of a co-operative of vegetable growers called the Lea Valley Salad Co Ltd. During the period of his overseeing the operations of this co-operative it ran into financial difficulties. One of the customers of the co-operative was a company called Ken Perrett (Evesham) Ltd and at the time of the matters which later were the subject of investigation that company owed something in excess of £11,000 to the co-operative.

The applicant made arrangements for that sum to be paid, not to the co-operative which was likely to go into liquidation but to another company where he had a majority holding called Raltrex Ltd. That sum was duly paid by the customer and, thereafter, the money disappeared or remained unaccounted for.

The applicant's explanation of these financial transactions was that he had made these arrangements to protect the other growers in the co-operative from financial difficulties, and it was also his case that they and others had been informed of what it was he had set out to do. It was for those reasons that the police investigation took place, and in due course the applicant was charged with conspiracy to defraud contrary to common law. Charged with him was an associate named Nichols, an accountant who had been concerned also in the running of the co-operative.

By its very nature it was a substantial case, according to the applicant's affidavit the depositions amounted to nearly 200 pages and there was a very large number of exhibits. It was obviously a case which needed careful and proper preparation.

In the initial stages the applicant instructed solicitors privately and, indeed, before the matter even came on for trial he had expended a sum in excess of £9,000. As a result he ran out of money and made an application to the Crown Court at St Albans for a legal aid certificate. On the first occasion that application was refused. It was subsequently renewed and on that second attempt the judge (who considered each of the applications) granted the applicant a certificate of legal aid but made it conditional on his paying the sum of £1,500.

From a practical point of view that was a hopeless decision because, for the reasons I have already stated, the applicant no longer had funds to meet the costs of his trial. It appears that the judge had made the decision on the basis that the applicant, at the time, owned and was living with his wife in a house which was of substantial value. The relevant regulations at that period in fact provided that that feature, on any application for legal aid, had to be disregarded. The judge's decision to refuse the application on that

When the trial started in September 1982 the applicant had to represent himself. It would be difficult enough for a man in his position to contend with the complexities of a trial involving an allegation of fraud, but his difficulties were compounded by the fact that his co-defendant, Nichols, was represented by counsel and, to some extent, the blame was heaped on the applicant by his co-defendant. He was thus in a difficult position and in the result he was convicted of the offence.

The trial judge imposed a sentence of three years' imprisonment with a compensation order for the repayment of the money that had been paid by the customer and also an order to pay prosecution costs. He instructed his solicitors to appeal immediately but unfortunately, for reasons which are not clear, the appeal was confined to one against sentence. As a result, when the applicant appeared before the Court of Appeal in July 1983, whilst the sentence was reduced there was no argument that his conviction was unsafe. It was in those circumstances that he served a prison sentence from the dates I have already adverted to: October 1982 to October 1983.

The applicant continued in his attempt to appeal against the conviction and subsequently was successful in bringing it before the Court of Appeal, which heard it on 5 July 1985. On that occasion the presiding judge condemned what had happened in strong terms, saying that the case was very disturbing indeed. As a result of his comments about the manner in which the case had been presented the applicant's appeal was allowed and his conviction quashed.

On 30 July 1985, two or three weeks later, his solicitors wrote a letter to the Secretary of State asking for compensation on behalf of the applicant for the term of imprisonment which he had served. The letter, which was comprehensive, set out most of the facts which I have already recounted. Towards the end of it the solicitors wrote this:

'We are therefore applying to you on behalf of Mr. Harrison for compensation for the one year he spent in prison as a result of the negligence/misconduct of the Public Officials involved here, namely the Court Officials and the Trial Judge. If there is any matter upon which you require further assistance in order to determine the amount of compensation, please do not hesitate to contact us. Additionally, if there is any matter which you feel militates against compensation could you draw it to our attention so that we can make adequate representation to you in relation to that.'

Thereafter it took some months for this letter to be considered. The respondent referred the matter to the Lord Chancellor's Department. Subsequently, having received a report from them, he considered the application and, on 3 February 1986, as I have already said, refused to pay compensation to the applicant.

During the course of these proceedings, at an interlocutory stage, discovery of certain documents in the possession of the respondent was ordered. One of them, headed chapter A14, is a document which sets out the criteria on which the Secretary of State operates when entertaining an application of this kind. It says this:

'For persons convicted but later granted a free pardon, acquitted after a reference by the Secretary of State to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 or acquitted on appeal out of time—those are the three separate categories—an *ex gratia* payment may be made provided that: (a) on a balance of probabilities, the claimant was more likely than not to have been innocent; and (b) hardship to the claimant has resulted.'

There was a further alternative basis on which he would entertain applications which related to persons who were convicted but acquitted on appeal, having made their application to appeal within time. In those circumstances he would not entertain an application for an *ex gratia* payment unless, in addition to fulfilling criteria (a) and (b) which I have just read out, there had also been some negligence or default on the part of

During the period that the Secretary of State was entertaining the application made by the applicant in this case, he made a statement to the House of Commons on 29 November 1985, setting out the basis on which he considered these claims. He pointed out, as is the case, that there is no statutory provision for the payment of compensation from public funds, but then went on to explain how, in certain circumstances, he would grant them.

Without going through the Home Secretary's statement, he repeated in effect the grounds that have appeared in the document to which I have already referred (chapter A14), with an additional modification arising out of the United Kingdom obligations under the International Convention on Civil and Political Rights (New York, 16 December 1966; TS 6 (1977); Cmdd 6702). That is not material to the present proceedings.

I am satisfied that there was no variation in fact from the criteria which he already operated, as set out in chapter A14. It is to be noted, however, that in his statement to the House of Commons he did not set out the two conditions (a) and (b) which I have already recited. The reason is that if he was to make it public, as indeed alas it now has been, that he would operate the scheme on the basis that payment would be made only, *inter alia*, if it was established on the balance of probabilities that the claimant was more likely to be innocent than not, it would reveal to those who knew of the matter that if anybody was refused an *ex gratia* payment there would be reasons to suspect that the Home Secretary thought that he was still guilty, even though he had been acquitted. That is why the confidentiality of that aspect of the scheme had hitherto remained.

The applicant came within the first of the criteria that I read out. He was in that group of three, namely a person who had been acquitted by the Court of Appeal on an application made out of time. He was not therefore concerned to establish the negligence and default on the part of the police or some other public authority. That has, in fact, been argued before us but, in my judgment, a judge does not come within the definition of 'police or of some other public authority'. There was no need for the applicant to establish that category because, I repeat, he was already entitled to have his claim entertained by the Home Secretary on the other one. No doubt the fact that he had suffered as a result of the orders made by the judge when he applied for legal aid was a factor that the Secretary of State would properly take into account, but it is because of the confidentiality of these criteria that the applicant now bases his present claim.

The grounds are that the Home Secretary had acted unfairly. Whether that is because the decision he made or because the policy embodied in this document which he followed was unfair perhaps does not greatly matter. In effect, it seems to me at all events that the applicant has got to attack the policy as being an unfair one if he is to succeed in the present claim.

The fundamental point made by counsel for the applicant is that the applicant and his solicitors were never informed of these criteria which were adopted by the Secretary of State. Putting it more shortly, he was never aware that his guilt or innocence was in issue as part of the application.

It is the contention of counsel for the applicant that the solicitor, and the applicant himself, should have been so informed so that they could have addressed points to the Secretary of State for his consideration. He says this complainant is in fact fortified because as appears from the same document (chapter A14) the Secretary of State, when entertaining an application of this kind, calls for a police report; not to give an opinion on the guilt or innocence of any particular applicant, but simply so that the Secretary of State can familiarise himself with the background of the matter. The Secretary of State also calls for the documentation on the case from the Court of Appeal.

The complaint made by counsel for the applicant is that if this information is available to the Secretary of State, it ought to be provided for the applicant himself. He too should have the opportunity to study those documents so that he can make comments on them on his own behalf without disclosing his innocence or reflecting anything that may be

contained in the documents which may be to his prejudice. He was given no opportunity therefore to deal with the allegations against him. Putting it in the bald phrase that counsel for the applicant used in his submissions to us, the Secretary of State weighed the matter up but he weighed it up on one side only.

A further complaint made by counsel for the applicant was in relation to the consultation by the Secretary of State with the Lord Chancellor's Department. He said that was transferring the responsibility from his own shoulders to that of the Lord Chancellor. In fact, a study of the documents shows that that is an unreal complaint. It is apparent that the Secretary of State for the Home Department (the respondent) was inquiring whether the Lord Chancellor's Department had any scheme which would operate to compensate the applicant in the present case. It appears that because the decision was made by a judge and not by one of the staff of the department, no such scheme was in being. That was the extent of the reference. I deal no further with that part of counsel's argument.

Finally, he said that the Secretary of State, in giving his decision, did not disclose the reasons for it, neither did he do so in the affidavit filed on behalf of the Secretary of State. This is not a ground that was pleaded as part of the motion in this case but, none the less, it has been raised and dealt with by both sides.

Summarising those arguments on behalf of the applicant, counsel submits that the Secretary of State acted unfairly towards the applicant and that the policy itself operated unfairly against the applicant. For those reasons he submits that the decision should be quashed by this court.

On behalf of the Secretary of State, reference was made first of all to the fact that the decision made by the Secretary of State in these proceedings was an exercise of the royal prerogative. It is a matter that is open at the present time; whether this court has and, if so, to what extent, any power to review such an exercise of the prerogative. In fact counsel on behalf of the Secretary of State, has reserved this point for argument on another day on the basis, as he submits, that on ordinary grounds of public law the present motion must fail.

It therefore behoves us to examine that argument. He submits that, first of all, there is no doubt that the Secretary of State adhered to the policy which is set out in chapter A14. There is no evidence before us to show that he acted otherwise.

In those circumstances, can that policy be challenged as being unreasonable or unfair on the basis advanced on behalf of the applicant? The answer to that question depends on the nature of the decision which the Secretary of State is making. It is necessary in considering it, and to what extent this court may be able to interfere, to look at the various features that attach to it.

First of all, it is necessary to bear in mind that this is an exercise of the royal prerogative. It is a power vested in the Secretary of State on behalf of the Crown. Accordingly, and second, that decision is not made within the framework of a statute or pursuant to the terms of any contract. Third, the very nature of the payment, being by description 'ex gratia', presupposes that there is no obligation to make it.

It is submitted by counsel for the Secretary of State that bearing those factors in mind, unless the Secretary of State can be shown to have acted fraudulently or with bias, he can set out his own rules for the application of this policy in the granting of payments of the kind with which we are concerned.

He illustrated the kind of category with which he says the Secretary of State is concerned by reference to a case which, on the facts, was very different: *McInnes v Onslow Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520, a decision of Megarry V-C. That was a case in which the plaintiff was applying for a licence from the Boxing Board of Control. The application was refused and the board gave no reasons for their refusal. Therefore the plaintiff brought proceedings to establish that the board were acting without natural justice.

It is in that context that Megarry V-C said ([1978] 3 All ER 211 at 219, [1978] 1 WLR 1520 at 1530):

"I do not think that much help is to be obtained from discussing whether "natural justice" or "fairness" is the more appropriate term. If one accepts that "natural justice" is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as "judicial", "quasi-judicial" and "administrative". Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation, and the further the question is removed from what may reasonably be called a justiciable question, the more appropriate it is to reject an expression which includes the word "justice" and to use instead terms such as "fairness", or "the duty to act fairly" . . ."

Thus at one end of the scale the rules of natural justice require that the procedures of a public tribunal are akin to those of a court of law. In contrast, when a decision is being made, as in this case, by a minister 'in his closet', to adopt the descriptive phrase of counsel for the Secretary of State, he is required only to act fairly in the sense that his decision is free from bias or fraud. In the present case there is no suggestion that the Secretary of State's decision is tainted in this way.

There is a further citation which can usefully be made from the judgment of Megarry V-C in the *Onslow Fane* case [1978] 3 All ER 211 at 223, [1978] 1 WLR 1520 at 1535, where he says:

"There is a more general consideration. I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens."

I do not for one moment suggest that the decisions of the Secretary of State for the Home Department could ever be given the generic title 'sporting and other activities', but the weight of Megarry V-C's observations, of course, is directed to the category of decision that has to be made, and for my part I accept the warning that he gives with regard to the practice of this court in reviewing such a decision.

A further point made in relation to the present application is that if the applicant is right, namely that the Secretary of State (or through his policy) has a duty to ensure that the applicant had an opportunity to put before the Secretary of State arguments supporting his innocence of the crime which was alleged against him, it would open the door to a very difficult debate. It would in fact involve, to some extent, a retrial of the matter that had come before the court on indictment.

The very nature of the confidential type of decision which has to be made by the Secretary of State when considering ex gratia payments militates against that kind of process. Basically we have to consider whether the Secretary of State's decision to keep the confidentiality of the criteria which he operates in this context is fair or unfair.

In my judgment there are no grounds for saying that such a decision is unfair. It seems to me to be an inevitable consequence of discharging the duty that is cast on him. It is not for this court to monitor or control the method by which he makes ex gratia payments pursuant to the royal prerogative. It follows from the nature of the decision which he is called on to make that he is equally under no obligation, having come to that decision, to give his reasons for having done so.

For those reasons I propose that this application should be refused.

STUART-SMITH LJ. The first question which falls to be determined, it seems to me, is whether the Secretary of State complied with the policy which he himself has set out. There is no dispute in this case that the applicant satisfied one of the conditions in para 4 of chapter A14, namely that he had been acquitted on appeal. But of time. It was also contended on behalf of the applicant that he came within the second and alternative category, namely that he was a person convicted but acquitted on appeal within time and that there had been negligence or default on the part of the police or of some other public authority.

It does not seem to me to be necessary to consider that point since it is accepted, as I have said, that the applicant falls within one of the categories in para 4, but speaking for myself I do not think that the fault or negligence, if that be it, of a judge can be described as 'negligence or default on the part of the police or of some other public authority.' I agree with Farquharson J that a judge exercising his judicial independence is not such a public authority or such a person within the scope of that paragraph.

That was a view taken by Phillips J in an unreported case to which we have been referred. So if it were necessary to decide it (which in my judgment it is not) I would take the view that the judge who made the error in this case does not come within that definition.

But the policy required, as Farquharson J has pointed out, that the Secretary of State, or in this case Mr Caffarey who exercised the powers for the Secretary of State, be satisfied (a) on a balance of probabilities that the claimant was more likely than not to have been innocent, and (b) that hardship to the claimant has resulted. Mr Caffarey says that he did consider those matters, and it seems to me that there is no material before this court from which we can conclude that he did not do so.

It was further submitted by counsel on behalf of the applicant that this case fell within the category of exceptional circumstances that justified compensation in cases outside the categories to which Farquharson J has referred. That was a part of the statement made to the House of Commons on 29 November 1985. But, in order to attack the Secretary of State's decision on that point, namely that it was not an exceptional case, it seems to me that the applicant would have to show that the decision was unreasonable in the *Wednesbury* sense, ie one to which no reasonable Secretary of State could come (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), or was irrational. For my part I do not think that that can possibly be said in this case.

The second question therefore that arises is whether or not the policy which the Secretary of State has is unreasonable, again in the *Wednesbury* sense. Counsel for the applicant has not suggested that it was unreasonable to have the two criteria to which I have referred, namely (a) that on a balance of probabilities the claimant was more likely than not to have been innocent or (b) that hardship to the claimant has resulted. Indeed, it seems to me to be quite impossible to contend that those are unreasonable requirements. The other aspect of this matter is whether or not it was unreasonable of the Secretary of State not to publicise those requirements. It is as counsel for the Secretary of State has pointed out, a very sensitive area and in chapter A14 the Secretary of State says:

'Because it would be undesirable and invidious for the Secretary of State to appear to cast doubt upon the innocence of a defendant who has been acquitted by the courts it is not the practice to refer publicly to criterion (a).'

Speaking for myself, I can see nothing unreasonable in that policy whatever. Indeed any other policy would seem to me to be very unsatisfactory. Unfortunately, as a result of this case no doubt, that is now made clear but it seems to me that it is quite impossible for the applicant to contend that that was an irrational or unreasonable policy.

Moreover, as counsel for the Secretary of State has pointed out, this is not a case where

there is a statutory or common law obligation on the Secretary of State to pay compensation in certain circumstances. It is an exercise of the royal prerogative. He is not obliged to have such a policy. He has in fact laid down a policy for himself and it seems to me that it would be highly undesirable for this court to indicate conditions or the manner in which he should seek to exercise it.

The third complaint and really the nub of the case of counsel for the applicant here is that there was procedural unfairness in relation to the applicant because the applicant was unaware of the requirement that he had to satisfy the Secretary of State on a balance of probabilities as to his innocence.

It seems to me that that proposition must fail unless the policy to which I have just referred can be satisfactorily attacked. I do not see how it can be said that it was procedurally unfair to apply that policy in the applicant's case unless the policy can be undermined, and for the reasons which I have indicated I do not think it possibly can.

Therefore the main ground of complaint that the applicant advances, namely that he was unaware of that ground of the policy and did not address himself specifically to it, cannot be sustained. But the Secretary of State is under a duty to act fairly and he does have to consider the material in order to reach a conclusion on the two points to which I have referred, namely innocence and hardship.

What he does is to consider all the documentation which is before the Court of Appeal. That includes the depositions, the summing up, the notice of appeal and the judgment of the Court of Appeal. The complaint in this case is that the Secretary of State did not consider the applicant's case as to his innocence.

I find it difficult to see really what more could properly have been put before the Secretary of State. The documents which I have referred to, and in particular the summing up, must have contained an account of the applicant's defence, his case that was being put to the jury. It was not suggested in the notice of appeal that the judge had failed to do justice to the applicant's case in that regard. Had it done so and had there not been material before the Secretary of State on which he could deduce what the applicant's case was, then it may be that it would be incumbent on him to make further inquiries from the applicant. But in this case none of the grounds of appeal which were before the Court of Appeal touched on any criticism that the judge had failed to put adequately the applicant's case to the jury. The complaints were all of a different nature and it is not necessary to go into them.

It is true that the Court of Appeal in this case did not deal with the grounds of appeal other than that the applicant had not had a fair trial because of the refusal of legal aid. The other matters were not dealt with in that judgment but it does not seem to me that it really could be sustained here, in any event, as a complaint since the Secretary of State must have had the applicant's account as put forward by the judge in his summing up to the jury.

Moreover, it is not for this court to enter into a consideration of whether or not the Secretary of State is satisfied on balance that the applicant is more likely to have been innocent than not. It would be wholly undesirable that that matter should be dealt with in correspondence between the Secretary of State and the applicant. It is wholly undesirable that this court should seek to reopen any such issue at all. This is a matter solely, as it seems to me, within the discretion and consideration of the Secretary of State and not one on which this court should intervene.

The second and subsidiary head on which counsel for the applicant complains that there was procedural unfairness was that the Secretary of State considered a police report, as he may sometimes do, and did not ask the applicant to deal with what was said in it. I can dismiss that because there is no evidence in this case that the Secretary of State ever did consider a police report. It seems to me that that, again, must be a matter for his discretion. If he considers it necessary to have a police report on the prosecution, then so be it: he is entitled to do so if he wishes to.

The next ground on which the applicant contends that there should be a judicial review is that the Secretary of State gave no reasons for his decision, either in the refusal letter or in the affidavit, other than a bare assertion that the case did not fall within the criteria set out.

Cases vary enormously as to whether or not reasons for a decision should be given. At one end of the scale one has a tribunal such as the Immigration Appeal Tribunal, which was the subject of consideration in *R v Immigration Appeal Tribunal, ex p Khan* [1983] 2 All ER 420, [1983] QB 790. There it was said that a tribunal set up by Parliament, very similar to the position of a court, had to give reasons.

At the other end of the scale one has the exercise of the royal prerogative in this case. I would adopt again some words from the judgment of Megarry V-C in *McInnes v Onslow Fane* [1978] 3 All ER 211 at 219–220, [1978] 1 WLR 1520 at 1531, where he said:

‘I think it is clear that there is no general obligation to give reasons for a decision. Certainly in an application case where there are no statutory or contractual requirements but a simple discretion in the licensing body there is no obligation on that body to give their reasons.’

A fortiori it seems to me it is an exercise of the royal prerogative with sensitive areas such as I have indicated.

The final matter of complaint which the applicant raised was in relation to the reference by the Secretary of State for the Home Department to the Lord Chancellor’s Department for their consideration whether this case could be dealt with under the compensation scheme operated by that department.

I cannot myself see that any possible criticism can be directed to the Home Secretary in relation to that. It was in the applicant’s interest that they should refer it to another department in the hope that the matter could be covered by that department’s scheme. It is quite clear as it seems to me, the Lord Chancellor’s Department having unfortunately answered that question in the negative, that the Secretary of State thereafter continued to consider the matter. There is no evidence to my mind that there was any mistake of law here in the application of his own criteria. The fact that the Lord Chancellor’s Department decided that the error made by the judge did not fall within their scheme in no way represented a delegation of the Secretary of State’s functions to that department, nor, so far as I can see, did it in any way influence the decision in this case.

I can find no basis therefore on that ground either and for those reasons, and the reasons given by Farquharson J, this motion must be dismissed.

Application dismissed.

Solicitors: *David Lee & Co* (for the applicant); *Treasury Solicitor*.

Dilys Tausz Barrister.

Practice Direction

QUEEN’S BENCH DIVISION

Country court – Transfer of action – Transfer from High Court – Transfer from Queen’s Bench Division – Actions outside London – Cases suitable for transfer – Notice of proposed transfer – Objection to proposed transfer – Consideration of objection – Matters to be considered – Appeal from order of district registrar – County Courts Act 1984, s 40.

1. Section 40 of the County Courts Act 1984 provides for transfer of proceedings by the High Court of its own motion or on the application of any party to the proceedings (i) where the parties consent to the transfer or (ii) where the amount in issue is or is likely to be within the monetary jurisdiction of the county court or (iii) where the proceedings are not likely to raise any important question of law or fact and are suitable for determination by a county court.

2. Immediately after an action has been set down for trial at the trial centre, the district registry of the trial centre shall place before the district registrar of the trial centre the documents in the case. The district registrar will thereupon decide (a) whether or not the action appears to be suitable for transfer to a county court and (b) which county court appears to him to be the appropriate court to try the action if an order for transfer were made.

3. The following types of case will normally not be considered suitable for transfer to a county court. Cases involving (a) professional negligence, (b) fatal accidents (unless the damages are obviously modest), (c) allegations of fraud or undue influence, (d) jury trial, (e) claims against the police, (f) public rights or having special features of public interest, (g) novel or difficult point(s) of law, (h) complicated disputes of fact or of expert evidence, (i) more than about £25,000, (j) trials likely to last more than five days.

4. The district registrar of the trial centre shall serve a notice in Form 1 in the appendix on all parties to an action in which he has decided that the action appears to be suitable for transfer to a county court (‘a notice of proposed transfer’). [The appendix to the direction is not printed herein.]

5. Any party who objects to the proposed transfer or to transfer to the court specified in the notice of proposed transfer shall, within 14 days after service on him of such notice, give notice stating briefly the grounds for objection to the district registrar in Form 2 in the appendix (‘a notice of objection’).

6. Where no notice of objection is received in the district registry within the time limited, the district registrar shall make an order transferring the action to the county court specified in the notice of proposed transfer.

7. Where notice of objection is received in the district registry from any party within the time limited, the district registrar shall fix an appointment for consideration of the question of transfer and shall serve notice thereof on all parties to the action.

8. At the appointment the district registrar will consider all relevant matters and in particular those mentioned in para 3. Where unliquidated damages are claimed he will normally expect to receive an indication whether the award is likely to be more or less than £25,000; and in personal injury cases he will expect up-to-date medical reports to be available. After giving to all parties an opportunity to be heard, the district registrar will make an order transferring the action to a specified county court or will order that it remain in the High Court and will, in either case, make provision for the costs of the hearing.

9. Appeal from the order of the district registrar will lie to the presiding judge sitting on the circuit or to a High Court judge invited to act on his behalf by one of the presiding judges of the circuit.

10. Cases transferred to county courts under s 40 shall be heard by a circuit judge and not by a recorder or assistant recorder without the prior approval of a presiding judge.
 11. This direction will take effect on 3 October 1988.

Explanatory note

This practice direction lays down guidance for the transfer of Queen's Bench Division actions in district registries and establishes a system for enabling the court to consider whether cases should be transferred to a county court for trial. The system for the Royal Courts of Justice remains as set out in the Senior Master's Direction of 4 July 1984 ([1984] 2 All ER 672, [1984] 1 WLR 1023) and the Practice Statement issued by Michael Davies] on 12 January 1988 ((1988) Times, 13 January).

28 July 1988
 TASKER WATKINS LJ
 Senior Presiding Judge.

[An appendix to the direction, which is not set out herein, sets out a form of 'Notice of Proposed transfer to a County Court' (Form 1) and a form of 'Notice of Objection to transfer' (Form 2).]

Practice Direction

CHANCERY DIVISION

County court - Transfer of action - Transfer from High Court - Chancery business - London - Transfer of Chancery business to Mayor's and City of London Court - Pre-trial directions - Transfer of court file - Procedure - County Courts Act 1984, s 40(7)(8).

Under the arrangements for transfers to the Mayor's and City of London Court in accordance with the Vice-Chancellor's announcement of 26 May 1988 (see Practice Note [1988] 2 All ER 639, [1988] 1 WLR 741) the Chancery Registry usually send the court file to the Mayor's and City of London Court as soon as the order for transfer has been drawn up. However, as cases so transferred are not normally set down for pre-trial review in the county court, the master, when ordering transfer, will usually give pre-trial directions. Where those directions are unusually extensive or the transfer has been ordered subject to the fulfilment of some condition the Chancery Registry will not send the file to the Mayor's and City of London Court of its own motion. In such cases the registry is not able to monitor the working out of the master's order or the fulfilment of conditions, and the sending of the file to the Mayor's and City of London Court will have to be initiated by one of the parties' solicitors as required in sub-s (7) and (8) of s 40 of the County Courts Act 1984.

Where the file has been sent by the court both parties will be notified by the Mayor's and City of London Court as soon as it has been received. Where such notification is not received within about a fortnight of the order for transfer the parties themselves should, when ready, initiate the sending of the file simply by applying by letter to the Chancery Registry for the file to be sent. There is no need to lodge any documents.

R D MINROW
 Chief Master.
 21 July 1988

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LAW REFORM COMMISSION OF WESTERN AUSTRALIA

PROJECT NO. 43
COMPENSATION FOR PERSONS DETAINED
IN CUSTODY WHO ARE ULTIMATELY ACQUITTED
OR PARDONED

WORKING PAPER

Law Reform Commission
11th Floor
R. & I. Bank Building
593 Hay Street
PERTH W.A. 6000

8 November 1976.

Telephone 25 6022

PREFACE

The Law Reform Commission has been asked to consider the question of compensation for persons detained in custody who are ultimately acquitted or pardoned.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 14 January 1977.

Copies of the paper are being sent to the -

Chief Justice and Judges of the Supreme Court
 Chief Secretary and Minister for Justice
 Chief Probation and Parole Officer
 Citizens Advice Bureau
 Civil Liberties Association
 Commissioner of Police
 Community Welfare Department
 Department of Corrections
 Institute of Legal Executives
 Judges of the District Court
 Law School of the University of Western Australia
 Law Society of W.A.
 Magistrates' Institute
 Solicitor General
 Under Secretary for Law
 Law Reform Commissions and Committees with which
 this Commission is in correspondence

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

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TERMS OF REFERENCE

1.1 The Commission has been asked to consider whether compensation should be granted to persons who have been detained in custody and who are ultimately acquitted or pardoned.

INTRODUCTIONScope of paper

2.1 This working paper deals with two aspects of the administration of the criminal law which may warrant consideration for compensation.

These are -

- (a) where a person is detained in custody pending final disposition of his case and he is acquitted (either at the trial or on appeal);
- (b) where a person has been convicted and has served part or all of his sentence before his conviction is quashed or he is pardoned.

The first of these aspects broadly covers the day to day operation of the system of criminal justice as it affects persons accused of crimes. The second covers those unusual circumstances where a special reference to the Court of Criminal Appeal under s.21 of the Criminal Code results in an acquittal or where the Governor-in-Council has issued a pardon to that person.

General principles

2.2 From the time of Magna Carta in 1215 it has been a fundamental principle of the English common law that a man should not be imprisoned without a fair trial: see Magna Carta clause 39. This principle has found further expression in the "golden thread" of English criminal law that a man is presumed innocent until proven guilty: see *Woolmington v D.P.P.* [1935] AC 462 at 481. Having regard to these principles it might be thought that an accused person should not ordinarily be imprisoned or otherwise

prejudiced before he is tried (see paragraphs 7.1 to 7.10 below), and that if he is acquitted he should not suffer as a result of the proceedings. This does not always happen, however, and the question then arises whether the State should compensate the accused person, and if so, in what circumstances and to what extent.

2.3 In the pre-trial situation there has been a conflict between the principles mentioned in paragraph 2.2 above and the administrative necessity of ensuring that the accused person does not abscond before he can be tried. Accordingly, a person who is arrested and charged with an offence can be remanded in custody pending trial - a process described by Lord Hailsham as the solitary exception to Magna Carta in peace-time (noted in *Bail or Custody*, published by the Cobden Trust at 90).

2.4 The expectation of society to have the law enforced in an effective manner must be balanced against the rights of the individual. Detention in custody pending trial may in many cases involve substantial hardship to the individuals concerned and their families. For example, an accused who is detained in custody may well lose his income and possibly his employment.

2.5 It has been suggested that detention may also result in an increased likelihood of being convicted, and if convicted, being imprisoned: see *Bail or Custody* at 71-75. While it is difficult to analyse the precise reasons why this should be so, there does appear to be statistical evidence to support this conclusion from a number of studies in different jurisdictions: *ibid.* This may reinforce the commonly held impression that an accused person suffers some prejudice by reason of detention pending trial.

Bail

2.6 In Australia, as in England, the legal system has attempted to ameliorate such hardships and make the system more flexible by providing that after a person is arrested he must be brought before a justice as soon as possible: see Justices Act 1902, s.64; Criminal Code, s.570. The justice can then, with certain exceptions, either release him on bail or remand him in custody: see Justices Act 1902, ss.116-117. In the

case of offences triable summarily certain police officers may admit the accused to bail: see Police Act, s.48. In the case of other offences unless the offence is of a "serious nature" certain police officers may bail the person if it is not practical to bring him before a justice within twenty-four hours: see Justices Act, s.64.

2.7 In Western Australia bail is generally not granted by Courts of Petty Sessions to those people the magistrate considers are likely to -

- (a) abscond before trial;
- (b) intimidate witnesses;
- (c) hinder the investigation of the alleged offence;
- (d) commit further offences pending trial.

The Commission understands that bail in Western Australia is also refused on a wide variety of other grounds including "further enquiries to be made", "previous convictions", "the seriousness of the offence" and "no fixed abode": see also Brown, *Bail: An Examination* (1971) 45 ALJ 193. For the English position which is similar, see Michael Zander, *A Study of Bail/Custody Decisions in London Magistrates' Courts* (1971) Crim LR 191.

2.8 The manner of granting and refusing bail is under consideration by the Commission in Project No. 55 (review of the Justices Act) and Project No. 64 (review of bail procedures), and will be considered in detail in relation to those projects. However, bail also has some relevance to this project, since it is arguable that one effective way of dealing with the problems arising out of the acquittal of persons detained pending trial is to minimize the incidence of unnecessary detention in custody. This could be done by reforming the rules relating to bail and by changing the law and practice with regard to the manner in which proceedings are started - viz: a greater use of summonses and a lesser use of arrests would tend to reduce the problem. This has been suggested by the Australian Law Reform Commission in its Report, *Criminal Investigation* (ALRC 1975), paragraphs 62-63. If this were done it would in many cases avoid the need for a bail decision altogether.

2.9 The problem of determining whether a person is a good or bad bail risk, is not that magistrates lack sufficient legal powers but rather that the system is not geared to ensure that

the appropriate facts are gathered, verified and then placed before the magistrate in such a way that the bail decision can be made in the light of them. It appears from the Commission's enquiries that magistrates in Western Australia are very much aware of the difficulties in this field and of the need for relevant information to be obtained and placed before them before they make a bail decision. While the lack of information may not matter in minor summary charges where bail is granted by Courts of Petty Sessions almost automatically, it could make a difference in more serious cases.

2.10 The present bail system operates in such a way that some persons subsequently found not guilty have been remanded in custody before trial. It also operates so that many guilty persons who subsequently receive a non-custodial sentence have been detained in custody pending trial.

The American experience with bail

2.11 This shortage of relevant information about the accused has occurred in other jurisdictions. In New York it was overcome by a project initiated by the Vera Foundation, which is a private foundation set up as a result of the interest of Louis Schweitzer, a New York industrialist, in the protracted pre-trial detention of penniless youthful offenders. The project involved gathering and verifying certain simple yet appropriate items of information about the accused, such as family background, residence, prior convictions and employment, and placing it before the magistrate. This information was collated and graded on a points system according to a formula. Subsequent use of the system over a three year period from 1961 to 1964 indicated the reliability of the formula in assessing bail risk. The scheme thus had two desirable effects. The first was that it verified and placed the relevant information before the magistrate in a coherent manner. The second was that if the accused met the threshold requirement (that is if he scored the necessary points) he was statistically a good bail risk. Hence in the absence of some countervailing fact the magistrate could release the accused on bail with considerable confidence that he would appear at his trial. Full details of the scheme are set out in Appendix V.

2.12 A similar scheme could perhaps be considered for Western Australia. The method proposed by the Vera Foundation was considered and recommended by the Australian Law Reform Commission in its Report, *Criminal Investigation* paragraph 179. Its adoption on an experimental basis was also recommended by the English Working Party on *Bail Procedures in Magistrates' Courts* (HMSO 1974) but has not been included in the Bail Bill currently before the English Parliament.

2.13 In the United States following the success of the Vera Foundation's project the scheme has now been embodied in legislation in a number of jurisdictions, including New York and the District of Columbia.

2.14 If the courts could predict bail risk with greater accuracy, it is likely that the administration of bail would change. It may well be that more persons would be released on bail than at present; and it is likely that some who are now released would no longer be granted bail. It is conceivable, however, that the overall effect would be that fewer people who are subsequently found not guilty would be detained in custody pending trial.

Conviction quashed or pardoned

2.15 Apart from the pre-trial situation there will always be cases where an accused person has been tried and wrongly convicted and has served part or all of his sentence before his conviction is set aside. In Western Australia one such case has been that of Gouldham where his conviction was set aside following a special reference to the Court of Criminal Appeal several years after he had completed serving a prison sentence: see *R. v Gouldham* [1970] WAR 119. Such situations have more frequently occurred in England. Examples known to the Commission include the cases of Beck (convicted in 1904 and served ten years), Slater (convicted in 1908 and served eighteen years) and the more recent cases of Latimore (served three years of a life sentence for murder), Meehan (served seven years of life sentence for murder) Virag and Dougherty: see Appendix IV. The ordinary appeal processes do not always deal effectively with wrongful convictions, particularly where the evidence on which the accused was convicted was principally that of identity: see the Report of the Devlin Committee, *Evidence of Identity in Criminal Cases* (HMSO 1976).

2.16 Following the Devlin report and in view of the number of persons found to have been wrongly convicted in England on the basis of identity evidence, five senior judges sat in July 1976 as a special Criminal Appeal Court to review the cases of four people convicted on such evidence and currently serving sentences, who it was believed ought not have been found guilty: *The Times*, 10 July 1976. The Court quashed the conviction of two of these people.

2.17 In England the Court of Criminal Appeal has been criticized in the editorial of the *New Law Journal* 6 May 1976 for its restrictive view of its role on appeal which has resulted in miscarriages of justice not being corrected.

The powers of the Court of Criminal Appeal in Western Australia are contained in s.689 of the Criminal Code, the relevant part of which reads as follows:

"(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: . . .".

This provision was recently discussed in *Conroy, Warn and Sisson v R.* [1976] WAR 91. In that case the Chief Justice (at page 94) said the Court would be entitled to allow an appeal if "in its opinion, it would be dangerous or unsafe in the administration of the criminal law to allow a verdict of guilty to stand". However, no matter how widely its power is construed, the Court could not be expected to conduct a complete retrial and there is therefore always the possibility of a person who has been wrongly convicted failing to succeed on appeal.

WESTERN AUSTRALIA: SITUATIONS IN WHICH PEOPLE
CAN BE DETAINED IN CUSTODY IN THE COURSE
OF THE ADMINISTRATION OF JUSTICE

Pending trial

3.1 In Western Australia there are no comprehensive figures available on the number of persons detained in custody pending trial who are ultimately acquitted. The Western Australian Department of Corrections has produced some figures (see Appendix I) which are a by-product of a study and evaluation of the Duty Counsel Scheme: see M. Martin, *A sample of Custodial Remands Extracted from the Duty Counsel Scheme Evaluation Study* (unpublished, Western Australian Department of Corrections, 1975). These figures show that one person in twenty-three of those detained in custody was found not guilty (4.3 percent). While the sample is in itself too small to be reliable the figures derive some interest from the fact that they closely resemble the English statistics which show that approximately four to five percent of persons remanded in custody are acquitted.

3.2 For Australia as a whole it has been estimated by Mr. D. Biles, Assistant Director (Research) of the Australian Institute of Criminology, that of the 9,000 people in Australian jails at any one time over 1,000 of these are remanded in custody pending trial: see Australian Institute of Criminology Information Bulletin (1974) Vol. 1 No. 3 at 9. As far as Western Australia is concerned the most recent statistics available show that there were sixty-eight persons in custody awaiting trial or on remand pending sentence on the night of 30 June 1975. When regard is had to the length of time a person may be detained (for which see Appendix I) and the fact that it costs over \$160 per week to keep a person in custody, a significant cost to society can be seen to be involved.

During trial

3.3 Persons, even though granted bail pending trial, are sometimes detained in custody during trial. Since the case of *R. v Cutler* (1972) (Western Australian Supreme Court case No. 193/72) the practice has been to release the accused if exceptional circumstances exist for doing so. It appears that courts are now tending to be more readily satisfied

that such circumstances exist, with the consequence that more people are being released during trial. However, some accused are still detained during trial and it must be presumed that some of those persons are subsequently acquitted.

Pending appeal

3.4 Persons may also be detained in custody after conviction and pending appeal even though there is power for bail to be granted: see Criminal Code, s.700; Justices Act, s.187. The Commission understands that bail is not infrequently granted under the latter provision. In those cases in which bail is not granted a successful appeal could mean that an accused person has spent time in jail for a crime of which he has been ultimately acquitted. For example, in *R. v Cross* the Court of Criminal Appeal of Western Australia quashed both convictions against Cross and entered a verdict of acquittal: case No. 55/1972; Supreme Court Library Case No. 1152. By the time this happened Cross had been in custody for thirteen months.

Until conviction quashed or pardoned

3.5 There have been a number of cases of people convicted in Western Australia who have served part or all of their prison sentence and who have either had their conviction quashed or received a pardon. The case of Gouldham referred to in paragraph 2.15 above is a case in point. The accused was convicted of an offence and served a prison term of almost a year. Subsequently the conviction was quashed as a result of fresh evidence. The State Government made an ex gratia payment to him of \$12,500.

3.6 In a recent case Morse, Blackman and Antonovich were convicted of assault and sentenced to three months imprisonment. After a day's detention they were released on bail pending appeal. Before the appeal was heard it subsequently appeared that this was a case of mistaken identity. The men were pardoned and set free: see *The West Australian*, 25 and 29 October 1975 and the *Weekend News*, 25 October 1975.

REMEDIES AVAILABLE TO PERSONS IN WESTERN
AUSTRALIA WHO HAVE BEEN DETAINED IN
CUSTODY AND ULTIMATELY ACQUITTED
OR PARDONED

Legal remedies

4.1 Whilst Western Australian law is comparatively well developed to assist acquitted persons with their legal costs particularly in the inferior courts (see generally Official Prosecutions (Defendants' Costs) Act 1973 and the Suitors' Fund Act 1964), for the most part no remedy is available to compensate persons for loss caused to them by detention in custody. Officers of the State, such as magistrates and police officers, enjoy a wide measure of immunity from tort actions for wrongful arrest or imprisonment: see Justices Act, ss.230 and 232; Police Act, s.138. Apart from this, the vast majority of detentions do not, of course, occur as a consequence of misuse of authority by such persons: but cf. *Leutich v Walton* [1960] WAR 109; *Trobridge v Hardy* (1955) 94 CLR 147.

Ex gratia payments

4.2 Consequently, the only source of compensation which may be available is an ex gratia payment by the Crown. There are no official figures available as to how many ex gratia payments have been made. The Commission understands, however, that there have been no ex gratia payments for detention pending final disposition of a case and only one in the case of a person wrongly convicted: Gouldham.

COMPENSATION SCHEMES AND PROPOSALS
IN OTHER JURISDICTIONS

Other Australian states

5.1 There are no formal compensation provisions in other Australian states and ex gratia payments are rare. There have been no cases in which ex gratia payments have been made in Tasmania and, as far as the Commission is aware, none in Victoria in the twenty years prior to 1970: see opinion of Sir Marcus Gibson relating to the Gouldham case tabled in the Western Australian Legislative Assembly on 11 August 1970.

Nor does there appear to have been any case in Queensland in which an ex gratia payment was made.

5.2 In New South Wales there appears to have only been the case of McDermott, who in the 1940's served some years of a life sentence for murder. A Royal Commission found the evidence against him to be unsatisfactory and he was released and given an ex gratia payment of £1,000.

South Australian proposals

5.3 The Criminal Law and Penal Methods Reform Committee of South Australia has recommended that compensation should be paid to persons who are acquitted after having been detained in custody pending trial: see the Third Report of Criminal Law and Penal Methods Reform Committee of South Australia, *Court Procedure and Evidence* (1975) at 62, paragraph 4. The Committee recommended that compensation should be assessed by the trial judge after acquittal if he considers that, on the balance of probabilities, the defendant is innocent and has suffered loss amounting to hardship. The Commission has been informed that no decision has yet been taken by the South Australian Government on whether to implement this aspect of the report.

England

Detention pending trial

5.4 In 1808 Sir Samuel Romilly introduced a Bill into Parliament for granting compensation in certain cases to persons tried for felonies and acquitted: see Cobbett's Parliamentary Debates Vol. XI at 395-403. The question of whether the accused was to be compensated, and if so for how much, was to be left to the trial court. The Bill was withdrawn after strong opposition.

5.5 There has been considerable pressure in England in recent times for reform in this area from the Cobden Trust, from Dr. Glanville Williams, *The Proof of Guilt* (London, 1963) at 133 et seq, Professor Street, *Governmental Liability* (Cambridge, 1953) at 44, and others. However, as far as the Commission is aware, no legislation has been introduced into Parliament.

5.6 Thus, as in Western Australia, the only remedy is by way of ex gratia payment. Very few acquitted persons have been recommended for such payments by the Home Secretary. For example, of the 2,186 persons acquitted in 1972, only five were awarded ex gratia payments: see M. King, *Bail Reform: The Working Party and the Ideal Bail System* (1974) Crim LR 451 at 455.

Until conviction quashed or pardoned

5.7 Even where a person has been wrongly convicted and served part or all of the sentence it is difficult to get an ex gratia payment; moreover where one is granted it is rarely adequate. For example, of the seventy people who between 1950 and 1970 were either pardoned or had their convictions quashed very few received ex gratia payments: see Brandon and Davies, *Wrongful Imprisonment* (London, 1973), at 200.

5.8 However, there have been some famous cases in England involving miscarriages of justice in which ex gratia payments were made. For example, Adolf Beck who was awarded £5,000 spent ten years in prison for a crime he did not commit - a case of mistaken identity in which the real culprit was later apprehended. Another case was that of Oscar Slater, who was awarded £6,000. Slater spent eighteen years in prison for a murder of which he was innocent. There have also been such recent cases as Virag and Dougherty who received ex gratia payments. These last two cases led to the setting up of the Devlin Committee: see paragraph 2.15 above.

Other countries

5.9 Many jurisdictions operate schemes to compensate people who have suffered as a result of the inappropriate functioning of the system of criminal justice. These schemes differ widely as to the scope of compensation available and the way in which such compensation is assessed.

5.10 Some jurisdictions compensate only for erroneous conviction and subsequent imprisonment. These include Italy, Portugal, Spain, Mexico, Brazil, California, North Dakota, Wisconsin, New York and the United States in its Federal jurisdiction: see Appendix III for the text of the statute

relating to the United States in its Federal jurisdiction.

5.11 Other jurisdictions go further and also compensate for detention in custody pending final disposition of the accused's case. These include Sweden, Norway, Denmark, Austria, France, West Germany, Hungary, Holland, Belgium and some of the Swiss Cantons.

5.12 Paragraphs 5.13 to 5.31 below set out the details of some of these schemes. The information is derived from inquiries made from the Ministers of Justice in the countries concerned.

West Germany

5.13 Compensation in West Germany is available from the State Treasury in three broad situations in which an individual may have been inappropriately dealt with by the system of criminal justice. These are -

- (a) where a person has received a sentence which on appeal is subsequently quashed or reduced;
- (b) where a person has been damaged by being detained in custody pending trial, or by some other prosecution measure and the person is acquitted or the proceedings against him are discontinued;
- (c) where the pre-trial criminal process is discontinued at the discretion of the court or the State Attorney's office.

5.14 In each of the above situations the accused person has a right to compensation, but only insofar as it is equitable in the circumstances of the case. Compensation is barred where the accused person has by some action of his caused the prosecution either deliberately or through gross neglect.

5.15 Compensation may also be refused if the accused kept silent about mitigating circumstances or had made a confession which was subsequently found to be false, or if the proceedings were discontinued because of the accused's unfitness to plead or because of some technicality.

5.16 Compensation is available for both pecuniary and non-pecuniary loss and is assessed by the trial court either at the conclusion of the proceedings or at some later date. There is no limit on the amount of compensation which can be awarded. Any person who is maintained by the accused person has a claim for compensation as well as the accused. There is a full right of appeal from the compensation decision.

5.17 In 1974, the last year for which figures are available, 1,300 people received compensation in West Germany under this legislation. The total sum expended was DM2.5 million (A\$ 818,598).

Sweden

5.18 In Sweden a person who has been detained in custody pending trial can claim compensation from the Government if -

- (i) he has been found not guilty at his trial;
- (ii) the charges are withdrawn at his trial;
- (iii) the preliminary investigations are concluded without legal proceedings being instituted.

A person who has served a prison term is also entitled to compensation from the Government if his conviction is quashed on appeal without a new trial being ordered or if a reduced sentence is imposed.

5.19 A person has no right to compensation if he has caused the custody situation, destroyed evidence, or in some other way made investigation of the crime more difficult. Compensation is not paid if it is unreasonable to do so having regard to the circumstances of the case. However, compensation cannot be refused merely because the question of guilt or innocence has not been resolved.

5.20 Compensation covers both pecuniary loss and non-pecuniary loss and there is no limit on the amount of compensation which can be paid. Any amount of compensation which a claimant has a right to claim from some other source is deducted from the compensation otherwise payable. The compensation scheme is administered by the Attorney General who decides whether there is to be compensation and, if so, the amount. If the claim

is in excess of 100,000 Swedish crowns (A\$ 18,730) then compensation is decided by the Government instead of the Attorney General.

5.21 In 1975, the last year for which figures are available, approximately 160 people were acquitted after being detained in custody pending trial and a further 72 persons had their conviction quashed on appeal. Of these 232 persons 55 received awards of compensation totalling 120,743 Swedish crowns (\$A 22,615).

France

5.22 Under French law compensation may be granted to persons detained in custody pending trial and subsequently acquitted and to those recognised as innocent after being convicted. In the case of detention pending trial the person charged does not have to prove his innocence. In fact the accused may have escaped being convicted merely by receiving the benefit of the doubt. However, he must show that detention in custody has resulted in "obviously abnormal damage of particular severity". This qualification greatly restricts the number of people to whom compensation is paid. For example in 1973, 54,000 people were detained in custody pending trial and of these 1,037 were acquitted. However only about four acquitted persons per year receive compensation.

5.23 If compensation is granted it is not limited to financial loss but covers all non-pecuniary loss suffered by the accused as well. There is no limit on the amount of compensation which can be awarded. The average sum awarded is about 56,000 francs per person (A\$ 9,162). In respect of people who claim to have been wrongly convicted the conditions are so restrictive that out of approximately sixty applications per year only one or two are successful.

5.24 Compensation for detention pending trial is awarded by a special commission of three judges, whereas compensation for a wrongful conviction is awarded by a court other than the one which tried the convicted person, but of the same status.

5.25 In respect of a person who has been wrongly convicted, his spouse, ancestors or descendants may claim compensation

as well as the wrongly convicted person. If the applicant so requests, the decree declaring his innocence will be displayed in the place where he lived and advertised in five newspapers chosen by the court. Legal aid is available for a person to pursue a claim of this nature.

Holland

5.26 Holland provides compensation for persons detained in custody who are ultimately acquitted and for persons whose sentence is annulled after having been wholly or partly served. Compensation is also available where a case is disposed of without any punishment having been imposed.

5.27 Compensation is provided for both pecuniary and non-pecuniary loss and there is no limit on the amount of compensation which can be awarded. Compensation is provided for arrest by the police as well as actual detention in custody. An application for compensation must be submitted within three months after the close of the case. The applicant has a right to be heard and is entitled to be represented on such a hearing by counsel. Insofar as it is possible, the court deciding compensation is composed of the same members of the court who presided at the trial. A full right of appeal is allowed from all compensation decisions.

5.28 Compensation is awarded provided the court is of the opinion that taking all the circumstances into account it is fair and reasonable to do so. The law does not require the applicant to prove his innocence, but on the other hand does not lay down that compensation must be awarded automatically in every instance.

5.29 A claim for compensation for damage suffered by a person wrongly detained may alternatively be submitted by his dependants and the compensation paid to them. In that event no compensation is awarded for any non-pecuniary loss suffered by the person wrongly accused.

5.30 If the accused person dies after having submitted his application or after having lodged an appeal, compensation is awarded to his heirs.

5.31 In 1973, the last year for which figures are available, 7,177 persons were detained in custody pending trial and of these 134 were ultimately acquitted. Of these only six were awarded compensation, the total amount awarded being FLS 8,541 (A\$ 2,672). The average number awarded compensation for 1969 to 1973 was fifteen persons per year. There are no figures available for compensation awarded on an annulment of sentence. Such cases are apparently very rare.

United Nations

5.32 The United Nations adopted, as part of the United Nations Covenant on Civil and Political Rights, a clause stating that where a person has been erroneously convicted by final decision he should be entitled to compensation: see Article 14(6), reproduced in Appendix III. Australia signed this Covenant in 1972. However, while this binds the Commonwealth of Australia internationally, legislation to give effect to the Covenant within Australia would require to be enacted by the appropriate Parliament or Parliaments: see Wynes, *Legislative Executive and Judicial Powers in Australia* (5th ed) at 89 and 296-301. No legislation to ratify or give effect to the Covenant has been passed.

SHOULD THERE BE A SCHEME OF COMPENSATION IN WESTERN AUSTRALIA?

General

6.1 In paragraphs 7.1 to 9.9 below, the Commission discusses the categories of loss that might be covered by any statutory scheme to compensate those who are detained in custody and subsequently acquitted or pardoned, and possible alternative procedures for determining such claims. These questions, of course, only become relevant if the decision is made to introduce a statutory scheme. The Commission has come to no conclusion on this basic question and would welcome comment. In order to elicit considered views on the matter, the Commission has set out in the following paragraphs of this section what it considers to be the principal arguments for and against the introduction of a statutory scheme of compensation. In considering the question it should be borne in mind that although no statutory scheme exists elsewhere in Australia or in the United Kingdom, the notion is not without precedent, for such schemes have operated successfully in a number of countries for many years: see paragraphs 5.9 to 5.31 above.

6.2 The argument for introducing such a scheme is simply that the State, through the direct action of its officers, has caused loss to persons who are subsequently found not guilty of the charges against them or who are pardoned, and it is better that the State should bear the loss (that is, pay compensation) than that the unfortunate individual should be forced to bear it. The kinds of loss that may be suffered in particular cases by persons detained in custody are outlined in paragraphs 7.1 to 7.10 below. The principle that the State, rather than the individual, should bear the loss is already accepted in the Official Prosecutions (Defendants' Costs) Act 1973 in the context of the legal costs of an accused who is acquitted. Until the passing of that Act, the general rule was that costs were not awarded against the Crown unless it was shown to have been at fault in bringing the prosecution. However, under the legislation, costs to acquitted defendants are awarded as of right (subject to certain limited exceptions): see Official Prosecutions (Defendants' Costs) Act 1973, s.5.

6.3 In reply, it could be argued that compensation should be payable only if the officials concerned were at fault, and that, if they were, the proper course is for the person suffering loss to commence proceedings against them. However, officials at present enjoy a wide measure of immunity from tort actions (see paragraph 4.1 above) which was given them so that they could proceed with the efficient discharge of their duties without undue harassment. To reduce or remove this immunity may therefore not be in the public interest. Further, the relief offered to persons detained in custody would be of a very uncertain nature if their only recourse was against individual officials. Cases where officials involved in the administration of justice act in bad faith are rare. In the overwhelming proportion of cases, those charged with the responsibility of administering criminal justice carry out their duties in a proper and reasonable manner. The argument in favour of a statutory scheme of compensation (as distinct from giving a right of action against an official) does not depend on the assumption that the State or its officers were at fault: see paragraph 6.2 above.

6.4 It might also be argued that the notion of a statutory scheme of compensation for persons who have been detained in custody and ultimately acquitted is misplaced, since it assumes that those who are acquitted are in fact innocent of the charge, whereas the precise question before the trial court is whether

the offence has been proved beyond reasonable doubt. To obtain acquittal, it is not necessary for the accused affirmatively to show his innocence.

6.5 It is of course true that in the case of acquittals the question of the accused's innocence has not necessarily been settled. In common with most other jurisdictions, no more detailed verdict is obtainable from the jury which would reveal whether it considered that the accused was innocent of the charge against him. Even where a conviction is quashed or a pardon given (see paragraph 2.1 above), the question is not "Has the innocence of the prisoner been affirmatively shown?" but "Was the conviction so defective that it cannot properly be sustained?".

6.6 Some persons might feel that most of those who are acquitted are in fact guilty and "get off" because of luck or technicalities. For example Sir Robert Mark, the Commissioner of the London Metropolitan Police, stated in a public lecture that "only a small proportion of those acquitted by juries are likely to be innocent in the true sense of the word" and under the present system it was the professional criminal who was "the very man most likely to escape society's protective net" (see Robert Mark, *The Disease of Crime, Punishment or Treatment* (1972) Royal Society of Medicine at 6 and 13). This view was strongly criticised by Michael Zander in *Are too many Professional Criminals Avoiding Conviction? - A study in Britain's two busiest Courts*, *Modern Law Review* Vol. 37 (1974) at 28. Of particular interest in Zander's article was a statement of a senior prosecuting counsel who pointed out that a large number of those acquitted should never have been tried in the first place because there was insufficient evidence: *op. cit.* at 48.

6.7 However, even if some guilty persons are in fact acquitted (and it would seem likely that this is the case), it should not be concluded that a statutory scheme of compensation should not be introduced at all. Such an argument would seem to be relevant only to the question of what the claimant should be required to prove in order to obtain compensation. It does not seem to be an argument against a compensation scheme as such.

6.8 A further argument against introducing a scheme is that if reforms were made to the bail system and to the procedure for dealing with more cases by summons instead of arrest (see paragraphs 2.6 to 2.10 above), the number of persons likely to suffer

compensable loss or damage would be so reduced as to make it unnecessary to have any formal scheme of compensation. It may be suggested that any cases that did arise could be satisfactorily dealt with by way of ex gratia payments. On the other hand there will always be a hard core of exceptional cases which warrant compensation as a matter of right and not at the discretion of the Government. In other words, it might not be sufficient to deny a statutory right to compensation merely because the criminal justice system was working well over all. It is little consolation to the individual who has been detained in custody, to know that there are few others who have been similarly dealt with.

6.9 There are two other arguments that may be advanced against a statutory scheme of compensation - one based on the supposed attitude of the police, and the other on the supposed attitude of juries. The first is that the police might be less likely to prosecute suspected persons. However, the police when arresting a person would never know whether that person would become liable to be compensated or not. There do not appear to have been any justifiable complaints of this nature arising out of the Official Prosecutions (Defendants' Costs) Act 1973.

6.10 The second argument is that juries would be more likely to convict if they knew the accused would receive compensation on acquittal. However, the jury would rarely know whether the accused had been remanded in custody or on bail, or had suffered any loss which would entitle him to compensation on acquittal. It is therefore unlikely that the jury would be influenced by the possibility or otherwise of a claim for compensation.

Criteria

6.11 If it is assumed that a statutory scheme of compensation is desirable in some circumstances, the question arises as to precisely what those circumstances should be. Perhaps the most important question in this context is whether compensation should be payable only to those who satisfy the determining authority that they are in fact completely innocent of the charge.

6.12 At first sight, to impose a requirement that the applicant prove affirmatively that he is innocent seems reasonable. Nevertheless, there appear to be difficulties

in this notion. Firstly, it would often require separate proceedings to determine the question. The criminal trial is, as pointed out in paragraph 6.5 above, concerned solely with the question whether the charge was proved beyond reasonable doubt, and sufficient evidence may not have been produced to prove innocence affirmatively. Guilt and innocence are sometimes uncertain concepts, involving the ascertainment of the state of mind of the accused and the witnesses. If evidence of the accused's innocence is not overwhelming, it would probably be necessary to institute full scale proceedings as to the question of his innocence, and to give opportunity to the Crown to produce evidence in rebuttal and to cross-examine the applicant and his witnesses. In other words, it might be necessary to traverse again all the issues that were involved in the criminal trial, this time from the point of view of the accused's innocence.

6.13 A further argument against requiring proof of innocence is that, if the applicant is denied compensation on this ground, his reputation may be compromised, and his acquittal at the trial converted into a "second class acquittal". This would particularly be so if determination of the question of compensation was in the hands of the trial judge (see paragraph 9.4 below), and could also be so if that question were decided by a separate tribunal. A similar point was made by the Commission's predecessor, the Law Reform Committee, in its working paper on the payment of the legal costs of acquitted persons: see the Working Paper on Project No. 12, *Payment of Costs in Criminal Cases*, paragraph 31.

6.14 It may therefore be preferable not to treat innocence as the determining criterion. It is significant that none of the European schemes described above requires affirmative proof of innocence.

6.15 Although there may be good reasons against introducing a requirement that the applicant prove his innocence, it does not follow that compensation should be awarded as a matter of course in every case. In paragraph 8.5 to 8.6 below the Commission discusses the question of other possible bars to compensation. These parallel the bars enacted by the legislature in the Official Prosecutions (Defendants' Costs) Act 1973: see s.6.

6.16 The Commission has no final views on the question of the criteria for determining whether in a particular case compensation should be paid, should a statutory scheme be introduced. The Commission would welcome comment.

POSSIBLE COMPENSABLE LOSSES

Pecuniary loss

7.1 There are several possible categories of pecuniary losses which could be incurred by a person eligible for compensation under a statutory scheme. Legal costs have already been mentioned: see paragraph 4.1 above. Other possible losses are -

- (i) loss of income;
- (ii) loss of employment;
- (iii) loss of accommodation, loss of goods on hire purchase, and so on;
- (iv) economic losses generally.

(i) *Loss of income*

7.2 A significant loss which may be incurred by an accused who is remanded in custody is loss of income. This loss may lead to a chain reaction of other losses as the accused will become unable to keep up repayments on accommodation and other commitments. In the case of an employee, loss of income will usually be easy to ascertain but may be more difficult in the case of a self employed person.

7.3 Since 1973 the Commonwealth Government has paid a discretionary special benefit to people detained in custody pending trial at a rate equivalent to unemployment benefits. Formerly, as such people were not available for work they did not come within the qualifications for unemployment benefits. However, the special benefit would be of only marginal assistance to the average wage earner who would have house repayments, hire purchase and other commitments to meet. Nevertheless, it should be taken into account in assessing compensation if the persons have actually received them.

(ii) *Loss of employment*

7.4 Detention in custody on a criminal charge frequently results in loss of employment: see *Bail or Custody* at 79-80. This would be compensable if liability were based in tort, i.e. on the principles applicable to ordinary civil actions. A different way of dealing with the situation might be to provide appropriate employment protection measures. This is a familiar Australian legislative concept: see e.g. National Service Act 1951 (Cwth) s.54B. There are obvious practical difficulties with such an alternative. The Commission has no concluded view on this aspect and welcomes comment.

(iii) *Loss of accommodation, loss of goods on hire purchase and so on*

7.5 One consequence to a family, if the breadwinner is in custody, is that due to the loss of income default may be made on the normal outgoings in respect of mortgage repayments, rent or hire purchase commitments: see *Bail or Custody* at 81. Such losses would be compensable if compensation were assessed on a tort basis. On the other hand, it might be better to prevent or restrict the sort of action which can be taken against an accused person prior to his conviction. An analogy for this sort of provision is to be found in s.36A of the Hire Purchase Act 1959, whereby a consumer can apply to have his obligations suspended under a hire purchase agreement during illness or unemployment. Such a moratorium would prevent some of the more unfortunate situations from arising and thus tend to reduce the amount needed to be paid to adequately compensate the accused. However, it is difficult to assess whether such a scheme would be feasible in the context of accused persons.

(iv) *Economic losses generally*

7.6 If the compensation were based on normal tort liability, then all reasonably foreseeable economic losses would be compensable. These could include business losses due to absence from the business, failure to carry out a contract requiring personal service or even loss of or damage to the business.

Non-pecuniary loss

7.7 This is a further area which could be compensable if compensation were to be assessed on a tort basis. This would cover such matters as loss of enjoyment of life, emotional distress, loss of leisure time and so on: see discussion J.M. Jackson, *The Costs of Prosecution to the Acquitted*, New Law Journal (1975) at 1158. It might have particular relevance to a person who was not in employment and therefore had no claim for financial losses as such, for example, a mother looking after a house and family. The compensation schemes of those countries discussed earlier (see paragraphs 5.9 to 5.31 above) all provide compensation for non-pecuniary loss.

7.8 An instance of the way in which such matters can arise and the distress which can be caused is provided by the English case of F.E. Stalham which was reported in *The Times* on 26 November 1970 and in *Bail or Custody* at 79. Stalham was accused of a crime he did not commit and was detained in custody. He lost his home and his wife had a nervous breakdown. His father-in-law who had been living with them had to be placed in a hostel. One year after Stalham was acquitted, the family circumstances had still not been restored. The facts of the case are set out in Appendix IV below.

7.9 The above heads of loss, both pecuniary and non-pecuniary, would fall with even greater impact in the case of a man who has served part or all of his sentence before his conviction is quashed or he is pardoned.

7.10 It is, therefore, arguable that compensation should be awarded under the usual tort basis for both pecuniary and non-pecuniary damage. The Commission invites comment.

Other benefits to be taken into account

7.11 As a matter of principle it would seem that any compensation scheme should be designed to compensate only for losses actually incurred. Any benefits obtained by the accused (e.g. special benefit under the Social Services Act) should be taken into consideration. Such a provision is to be found in the Swedish scheme: see paragraph 5.20 above.

Limit on compensation

7.12 It could be argued that detention of an innocent person in custody pending trial or the punishment of an innocent person is such a grave invasion of civil liberties that the State should fully compensate such persons. The State does not, for example, place a limit on compensation for resumption of a person's property: see Public Works Act 1902, s.34.

7.13 Alternatively, it could be argued that for practical reasons there should be some limit on compensation so as not to create too great a drain on the public revenue. However Sweden, France, Germany and Holland have no limits on compensation: see paragraphs 5.13 to 5.31 above.

7.14 If there is to be any limit on compensation, from the point of view of certainty it might be desirable to prescribe a maximum amount, such amount operating as a cut-off point. Opinion will obviously differ as to the appropriate upper limit, particularly as actual losses in this area can be very substantial. Possibly a cut-off point analogous to that in the Criminal Injuries (Compensation) Act could be appropriate: the Criminal Injuries (Compensation) Act Amendment Act 1976 has increased that sum to \$7,500. However, the effect of such a limitation would be that some people would be fully compensated and others would not. In fact, the more the accused was damaged the less adequately in proportionate terms would he be compensated. Thus if it were thought desirable to have a limit it could possibly be either a percentage of the full damages as assessed or alternatively compensation could be restricted to certain heads of loss. For example, compensation could be restricted to loss of income and legal costs.

7.15 It might be argued that detention pending final disposition of a case warrants a different limit on compensation than the case of a person who has been wrongly convicted and subsequently imprisoned. It might be thought that in the latter case a person should have a claim to more generous compensation than in the former. Alternatively, it could be argued that as a person suffers an injustice in both cases the limit on compensation should be the same, if indeed a limit were to be imposed.

CLAIMS FOR COMPENSATIONWho should be able to claim?

8.1 In deciding who should be able to claim, there are two distinct issues involved -

- (a) Should compensation be payable not only to the accused person but also to others who have suffered as a result of the detention of the accused?
- (b) Should the claim for compensation survive the death of the accused so as to vest a right of action in his personal representative?

Compensation for persons other than accused

8.2 When an accused person is held in custody pending trial not only may he be damaged but other persons who are dependant on him may likewise be damaged as was the Stalham Family: see Appendix IV. This may extend not only to his immediate family but to his employers and other persons who are in a business relationship with him. The damage may be particularly aggravated where the accused has been convicted and served part of his sentence. If the accused's dependants have suffered damage in addition to those suffered by the accused then it is arguable that they should have a claim in damages. All the European schemes outlined above except Sweden allow such a claim: see paragraphs 5.16, 5.25 and 5.29.

8.3 On the other hand, it might be said that to allow persons other than the accused to have a claim would be to extend the scheme too widely. It might prove difficult to draw the line if compensation was not restricted to the accused.

Survival of the claim

8.4 There have been a number of cases in various jurisdictions where a convicted person subsequently found to have been innocent has been either executed or died of natural causes while in custody. The question then arises whether his claim for compensation should survive so that it can be pursued by his dependants or personal

representative. It would seem arguable that at least his dependants should be able to claim in such cases. Whether his estate should be able to maintain a case is more debatable. The Commission has no concluded view on this aspect, and welcomes comment.

Bars to compensation

8.5 The question whether the accused should be barred from obtaining compensation if he does not prove his innocence affirmatively has been discussed earlier: see paragraphs 6.11 to 6.14 above. This paragraph and the following paragraph discusses whether there should be a bar of any other sort. It is arguable that an acquitted person should either be barred from recovering compensation altogether or that the determining authority should have a discretion to refuse compensation in the following circumstances: where the accused -

- (a) is discharged even though the offence is proved (for example under s.669 of the Criminal Code as a first offender or under s.26 of the Child Welfare Act);
- (b) is acquitted through incapacity, either insanity or infancy;
- (c) is acquitted of major offences but convicted of a lesser offence;
- (d) has contributed to his own misfortune - for example, by bringing about the prosecution by voluntarily signing a false confession, by hiding the guilt of another or by failing to disclose an alibi until the actual trial.

Certain overseas jurisdictions make provision for both bars and discretions: see paragraphs 5.13 to 5.31 above. There are also bars in Western Australia under the Official Prosecutions (Defendants' Costs) Act 1973: see s.6.

8.6 Frequently, people are charged with a number of offences at the same time, ranging from the principal offence to various minor offences. It could be that a person was held in custody because he was accused of a major offence and would have been released on bail if he had only been charged with the minor offences. An example taken from *Bail or Custody* (at 81) is that of Gibson, which illustrates that point, as well as the general predicament faced by people remanded in custody. Gibson was charged with a number of offences and acquitted of all charges except one of possession of two rounds of ammunition. He had spent three months in custody. For the full facts see Appendix IV.

PROCEDURE FOR DETERMINING CLAIM

Tribunal

9.1 The question as to who should decide compensation claims may permit of a variety of possible answers. However, determination of claims by an appropriate tribunal seems the most satisfactory means as such a tribunal would be independent of the trial system. This would be particularly important if a claim for compensation were to involve a consideration of whether the accused was innocent or not.

9.2 If the tribunal were involved merely with an assessment of losses, this could be done in an informal way so as not to create a further trial on the question of damages. The tribunal could be constituted by a single judge of the District Court, as is now the case under the licensing provisions of the Hire Purchase Act. A similar proposal was made by this Commission for the setting up of a Criminal Injuries Compensation Tribunal: see *Report on Criminal Injuries Compensation*, paragraphs 27-28. The enlargement of the jurisdiction of the District Court by enabling a single judge to act as a compensation tribunal would avoid the disadvantage which may arise if an entirely separate tribunal was established.

Other alternatives

(a) *Jury*

9.3 It might be argued that the jury should decide the compensation. However, this would confuse the question of guilt

or innocence with that of compensation. A jury should not be distracted from the real question at issue in the trial, which is whether the accused is guilty. Moreover, an accused person who is acquitted may wish to bring further evidence of the losses he has suffered before compensation is assessed. This could be done by allowing the accused to bring further evidence after the verdict of not guilty has been given but to do so would be very inconvenient in practice. It may also be impossible to accurately estimate the losses suffered by the accused at that stage. Moreover, except occasionally for claims for defamation, juries are not used in this jurisdiction for determining damages.

(b) *Judge*

9.4 It might be argued that the trial judge (or Magistrate in a Court of Petty Sessions) should assess compensation as he will have heard the evidence and be experienced in assessing damages. However, as with the jury, the issues at the trial should not be confused with those of compensation. Moreover, the trial judge may not agree with the jury's verdict and it might seem difficult for him to assess compensation impartially. Also, it may not be possible to assess accurately the damages suffered by the accused immediately after the trial even if he were allowed to call further evidence. This could be overcome by allowing the accused to make separate application at a later date, but there may be practical difficulties if the application has to be made before the same judge who presided at the trial.

(c) *Treasurer*

9.5 If the compensation scheme were limited to, say, legal costs and loss of income the Treasurer might be considered a suitable person to assess and pay out on claims. However, the Treasurer might not wish to become involved in a formal compensation scheme.

9.6 A practical objection to the Treasurer filling the role would be that his decision would not be subject to appeal. While this is the current position with applications for an ex gratia payment, it would not seem appropriate in the context of a formal compensation scheme.

(d) *Ombudsman*

9.7 It might be argued that the Parliamentary Commissioner for Administrative Investigations would be an appropriate person to decide the matter of compensation. He has expertise in investigating cases and making recommendations. On the other hand, it might well be thought that such a role would be inappropriate and in conflict with his role as a watchdog on the administrative activities of the Government - a role in which he does not make decisions, only recommendations.

Appeal

9.8 The question arises whether an applicant should be allowed an appeal from a compensation decision and if so to what court should such an appeal lie?

9.9 It would seem clear that if compensation is to be decided on the basis of tort with its attendant complexities a full right of appeal on both fact and law should be allowed. If the tribunal was constituted by say a District Court Judge then the logical hierarchy of appeal would be to the Full Court of the Supreme Court. Even if one of the other alternatives were chosen to decide compensation it would still appear appropriate that an appeal on such a matter should be to the most authoritative court in Western Australia.

QUESTIONS FOR DISCUSSION

10.1 The Commission invites comments on the issues raised in this paper or on any other matters within the terms of reference. In particular the Commission invites answers to the following questions. It would be helpful if reasons were given, where appropriate, for the views expressed.

- (1) In Western Australia should there be a scheme to provide compensation -
 - (a) where a person is detained in custody pending final disposition of his case and he is acquitted (either at the trial or on appeal);

- (b) where a person has been convicted and has served part or all of his sentence before his conviction is quashed or he is pardoned?

If the answer to question 1 is yes:

- (2) Should the scheme provide full compensation on the normal basis of damages in tort or should it only provide compensation for certain specific losses, e.g. loss of income and legal costs?
- (3) Should other benefits such as unemployment benefits be taken into account when assessing compensation?
- (4) Should there be a limit on compensation and if so what should that limit be or how should it be calculated?
- (5) Should compensation be claimable by other persons as well as the acquitted or pardoned person?
- (6) Where an acquitted or pardoned person has died, should his dependants or personal representative be able to claim?
- (7) Should the claimant have to prove his innocence to obtain compensation or should it be sufficient that the claimant has been acquitted or pardoned as the case may be?
- (8) Should there be any bars to compensation and if so what should these be?
- (9) Who should decide the claim - a special tribunal, the trial court (either judge or jury) or some other body?

APPENDIX ISurvey of remand prisoners

The following table refers to the actual length of imprisonment experienced by the twenty-three remand prisoners in the survey before sentence was passed or they were acquitted or the charge withdrawn.

Number of days in custody	Number of people
1	1
3	1
15	1
20	1
21	8
22	1
27	1
29	1
30	1
42	1
84	1
110	1
112	1
123	1
145	1
208	1
TOTAL 23	

Outcome of court hearing	Number of Charges	Relative Frequency
Charge withdrawn	2	1.9%
Acquitted on charge	1	.9%
Bench warrant issued	4	3.7%
Fine	2	1.9%
Probation	9	8.4%
Imprisonment	89	83.2%
TOTAL	107	100.0%

APPENDIX I (cont.)

Note: Each number refers to one charge. Thus there were 107 charges laid against 23 persons in the survey. It can be seen that on 14 charges the defendant was either acquitted, the charge withdrawn or he received a non-custodial sentence. An examination of the actual cases discloses that these 14 charges were against 8 people. One who was detained for 208 days, only had one charge (murder) against him, and was acquitted.

APPENDIX IIExtracts from Justices Act, Police Act and Interpretation Act*Sections 230 and 232 of the Justices Act 1902 (W.A.)*

230. In an action against a Justice for any act done by him in the execution of his duty as such Justice, it must be expressly alleged in the statement of claim or plaint that the act was done maliciously and without reasonable and probable cause, and if such allegations are denied, and at the trial of the action the plaintiff fails to prove them, judgment shall be given for the defendant with costs.

232. When the plaintiff in an action against a Justice is entitled to recover, and he proves the levying or payment of any penalty or sum of money under a conviction or order as parcel of the damages which he seeks to recover, or proves that he was imprisoned under such conviction or order, and seeks to recover damages in respect of such levying or payment or imprisonment, then, if it is proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum which he was so ordered to pay, and, in case of imprisonment, that he has undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum which he was so ordered to pay, he shall not be entitled to recover the amount of the penalty or sum so levied or paid, or any sum beyond the sum of a farthing as damages for such imprisonment, or any costs of suit whatsoever.

Section 138 of the Police Act 1892 (W.A.)

138. Sections A, D, G, and H of "The Shortening Ordinance, 1853", shall be incorporated with and taken to form part of this Act to all intents and purposes, and in as full and ample a manner as if the said section had been introduced and fully set forth in this Act.

Paragraph H of the Second Schedule to the Interpretation Act 1918 (W.A.)

No action shall lie against any Justice of the Peace, Officer of Police, Policeman, Constable, Peace Officer, or any other person in the employ of the Government authorised to carry the provisions of this Act, or any of them, into effect, or any person acting for, or under such persons, or any of them, on account of any act, matter, or thing done, or to be done, or commanded by them, or any of them, in carrying the provisions of this Act into effect against any parties offending or suspected of offending against the same, unless there is direct proof of corruption or malice; and if any such person shall be sued for any act, matter, or thing which he shall have so done, or shall so do, in carrying the provisions of this Act into effect, he may plead the general issue and give the special matter in evidence; and in case of judgment after verdict, or by a Judge sitting as a jury, or on demurrer being given for the defendant, or of the plaintiff discontinuing, or becoming non-suit in any such action, the Court before which the action was brought may award treble costs to the defendant or such portion of those costs as the Court thinks fit.

APPENDIX IIIExtracts from United States Code Annotated and United Nations Draft Covenant on Civil and Political RightsUnited States Code Annotated*Title 28 Part IV S.1495*

"Damages for unjust conviction and imprisonment - Claim against United States.-
The Court of Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned. (June 25, 1948, c.646. s.1, 62 Stat. 941.)"

Title 28 Part VI S.2513

"Unjust conviction and imprisonment.- (a) Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the Court of Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed the sum of \$5,000. (June 25, 1948, c.646, S.1, 62 Stat. 978; Sept. 3, 1954, c.1263, S.56, 68 Stat. 1247.)"

United Nations Draft Covenant on Civil and Political Rights*Article 14(6)*

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

APPENDIX IVSelected casesCase of F.E. Stalham mentioned in The Cobden Trust: *Bail or Custody* at 79

"Mr. Stalham was a 29 year old lorry driver with no criminal convictions, living with his wife, his retired father-in-law and a son aged eight in a council house. In March 1969 he was arrested and charged with serious offences in connection with a robbery which had allegedly been planned in his house. The magistrates at Hendon Magistrates' Court decided to remand in custody, after hearing the police object to bail on the grounds that Mr. Stalham might abscond and that two other persons in the case had still to be arrested. Altogether he appeared five times at the magistrates' court and was refused bail on each occasion, the police later altering their objection to asserting that Mr. Stalham might intimidate witnesses. Finally, when the case was committed to the Old Bailey, the police withdrew their objections and bail was granted with two sureties of five hundred pounds each. By the time he left Brixton, after almost four weeks in jail, Mr. Stalham no longer had a job to return to, and the rent of the house where he had lived for seven years, was seriously in arrears. Three weeks later he and his family were evicted. He had to live separately from his wife and child for three months, while his father-in-law was given hostel accommodation. The mental strain of the situation caused Mrs. Stalham to suffer a nervous breakdown and so disturbed their son that he had to be given psychiatric treatment "He was pining for me, while I was in prison." says Mr. Stalham.

He found it difficult to get work and could not obtain unemployment benefit because he was awaiting his trial, and was not, according to the local labour exchange, therefore "available for work". When the case was heard in July 1969, the judge directed the jury to find Mr. Stalham not guilty of all the charges against him. Over a year later, Mr. and Mrs. Stalham were still in temporary accommodation, the father-in-law was still living at a hostel, and the son was still receiving psychiatric treatment.

In this case an innocent man and his family found their lives completely shattered as the result of somewhat spurious police objections to bail - objections which do not appear to have any factual basis, and which were eventually withdrawn, although the circumstances affecting their validity had not altered in any way. Yet, unless he can prove the police acted maliciously, that is from improper motives, Mr. Stalham has no right of action under civil law. Furthermore, there is no Government fund from which he or his family can seek compensation for the financial and other hardships they have suffered."

Case of Robert Gibson mentioned in *Bail or Custody* at 81

The facts are as follows -

"He appeared before the Acton Magistrates charged with theft of a motor vehicle, receiving and possession of two rounds of ammunition. The magistrates refused bail because of the

APPENDIX IV (cont.)

seriousness of the charges and on the grounds that there were further police enquiries to be made and also that he might interfere with prosecution witnesses. Mr. Gibson was working as a computer progress chaser at the time of his arrest. He lost his job and with it an income of thirty-five to forty pounds per week. He had been living in furnished rooms and wrote to his landlady from prison telling her to treat the deposit he had paid her as rent for the period he was in custody. However the magistrates continued to refuse bail on each occasion that he appeared before them, and his application to a judge in chambers through the Official Solicitors' Department failed. After the deposit had been exhausted, his landlady asked him to terminate the tenancy agreement. Mr. Gibson agreed, because he could no longer afford to pay the rent. When the case next came before the magistrates, the police used the ground of "no fixed abode" as an objection to bail. He was again remanded in custody. The final outcome of the case was that Mr. Gibson, having been committed for trial, was found not guilty of theft or receiving, but guilty to possession of the two rounds of ammunition, for which he was fined twenty pounds. He had spent over three months in custody."

Case of Vincent Taylor Brown mentioned in *Bail or Custody* at 20

"A 23 year old West Indian living in London, was accused of entering a house and stealing a shirt, two bottles of beer and other small articles worth in all about one pound forty pence. At the time of his arrest he was living with friends of his parents, but when he appeared at East Ham Magistrates Court the police maintained he did not have a permanent address. He was remanded to Brixton Prison, where he spent eleven weeks before being granted bail by a judge of the North East London sessions who stated in court that he had 'never come across a case with such a lack of sense of proportion. The man has no previous convictions and he probably would not have been sent to prison anyway'."

Case of Dougherty*

Mr. Dougherty was convicted of a shoplifting offence which occurred when he was in fact on a special bus trip with fifty-four other people. Only two of these passengers were called as witnesses at the trial. The jury did not believe them and convicted Dougherty. Dougherty then appealed.

Under the rules adopted by the Court of Criminal Appeal fresh evidence cannot be called unless such evidence was unavailable at the original trial. It could not be said that the evidence of the other witnesses on the bus was of that nature and consequently the appeal was argued on another point of law and dismissed. The Court of Appeal however did advert to the evidence of the other fifty-four witnesses and said that counsel was right in not arguing the question of such fresh evidence before the Court. After a further investigation and public outcry Mr. Dougherty was pardoned and granted an ex gratia payment of £2,000.

APPENDIX IV (cont.)Case of Virag*

Mr. Virag was charged with stealing from parking meters, carrying a firearm with intent to resist arrest, attempted murder and wounding a police officer. He was wrongly identified by six witnesses and was convicted and sentenced to ten years imprisonment. After five years in prison it became clear that another person had committed the crimes. Virag was pardoned and given an ex gratia payment of £17,500 in compensation for his wrongful conviction and its consequences.

* For further details see Report of the Devlin Committee:
Evidence of Identification in Criminal Cases (HMSO 1976).

Meeting of Commonwealth Law Ministers

Sri Lanka, 14-18 February, 1983

COSTS FOR SUCCESSFUL DEFENDANTS IN
CRIMINAL CASES AND COMPENSATION
FOR WRONGFUL IMPRISONMENT

Memorandum by the COMMONWEALTH SECRETARIAT



Commonwealth Secretariat
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COSTS FOR SUCCESSFUL DEFENDANTS IN CRIMINAL CASES
AND COMPENSATION FOR WRONGFUL IMPRISONMENT

Memorandum by the COMMONWEALTH SECRETARIAT

This paper draws on material available at the Commonwealth Secretariat in January 1983 and on information supplied by a cross-section of Commonwealth jurisdictions.

2. The question of compensation for acquitted persons falls into two quite separate categories: compensation for those who incur costs in successfully defending criminal charges, and those who are imprisoned but are subsequently found (whether on appeal or subsequently) to have been wrongfully convicted. To some degree the criteria applied in redressing grievances can overlap, and in each instance the remedy provided is generally the tort of malicious prosecution.

A. COSTS FOR SUCCESSFUL DEFENDANTS

3. The normal rule in Commonwealth jurisdictions is that it is the prerogative of the State not to pay costs. As was said by the first Chief Justice of the High Court of Australia, Sir Samuel Griffiths in Affleck v. The King (1906) 12 ALR 112,119:-

"There is no doubt that at common law the Crown is, by its prerogative, exempt from the payment of costs in any judicial proceeding, or that this right cannot be taken away except by Statute."

4. The position may differ in courts of summary jurisdiction, where the State as such may not be the prosecutor [see Hamdorf v. Riddle (1971) SASR 398].

5. The question of costs for successful defendants only assumes relevance to the extent that a defendant is not the recipient of legal aid.

(i) Australia

6. The position in Australia varies from state to state, and the material available suggests that there is a considerable lack of uniformity throughout Australia in the respective State and Territory legislation on this topic and that the principles behind the enactment of the United Kingdom's Costs in Criminal Cases Act have been adopted by only New South Wales and Tasmania. Why this should be so is not clear as there is a general dearth of legal literature on the topic, both in Australian law journals and textbooks on costs and the criminal law.

7. The first Act enacted in Australia to deal specifically with the granting of costs to successful defendants in criminal cases was the costs in Criminal Cases Act 1967 of New South Wales. This provides, inter alia -

2. The Court or Judge or Justice or Justices in any proceedings relating to any offence, whether punishable summarily or upon indictment, may -

- (a) where a defendant, after a hearing on the merits, is acquitted or discharged as to the information then under inquiry; or

- (b) where, on appeal, the conviction of the defendant is quashed and -
 - (i) he is discharged as to the indictment upon which he was convicted; or
 - (ii) the information or complaint upon which he was convicted is dismissed,

grant to that defendant a certificate under this Act, specifying the matters referred to in section three of this Act and relating to those proceedings.

3. (1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Justice or Justices granting the certificate -

- (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
- (b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings, was reasonable in the circumstances.

(2) A certificate granted under this Act by a Justice or by Justices shall specify the amount of costs that he or they would have adjudged to be paid if he or they had made an order for costs against the informant, prosecutor or complainant, as the case may be.

4. (1) In this section "Under Secretary" means the Secretary of the Department of the Attorney General and of Justice.

(2) Any person to whom a certificate has been granted pursuant to this Act may, upon production of the certificate to the Under Secretary, make application to him for payment from the Consolidated Revenue Fund of the costs incurred by that person in the proceedings to which the certificate relates...

8. In his speech at the second reading of the Bill, the then-Minister of Justice said that the measure "represented a middle course" between two extremes. "It departs from the old English conception that costs in criminal trials should only be awarded in exceptional cases. On the other hand it establishes criteria which, when applied judicially, permit courts to make orders in appropriate cases without any innuendo arising from the making, or the refusal to make such orders that would be critical either of the prosecutor or the accused. In summary matters, costs may, by existing provisions of the Justices Act, be awarded against the informant. Where it would not seem appropriate to make such an order, the magistrate, under this bill, may grant his certificate leading to the successful defendant being paid by the Treasurer the costs which would have been ordered to be paid by the informant had the court seen fit. More important, where examining justices determine not to commit the accused for trial on the ground that the evidence is not sufficient to put him upon his trial, and for example are of the opinion that the charge was not made in good faith, the Bill permits them to order the prosecutor to pay costs incurred in or about the defence. Again it will be noted that the Treasurer may pay such costs where the court grants a certificate rather than order costs against the informant. The criteria to which I have referred, which will be relevant to the court in reaching its decision whether a certificate is to be granted, are simply applied. The two questions to be answered in the negative by the court before granting a certificate are first, does it appear that the prosecutor would not have been acting reasonably in initiating the proceedings had he been in possession of all the facts established in the course of the trial; and second, and equally important, did the defendant do or fail to do anything which resulted in or contributed to the proceedings' being commenced or continued. These two tests are applied in England where the Costs in Criminal Cases Act of 1908 permits the costs of the prosecution and expenses of witnesses for the prosecution or for the defence to be paid from local funds."

9. In an editorial (28 April 1967) the Australian Law Journal observed :-

"The Costs in Criminal Cases Act does not seek to pay the costs of their defence to all persons who are acquitted. The decision not to do so may be quite justifiable but once taken it is difficult to find any basis for reimbursement which will entirely eliminate the danger that a refusal of costs may be interpreted as casting a doubt on a jury's finding in favour of innocence. The Act itself certainly does not ask the court to consider guilt or innocence. Rather, it has regard to the reasonableness of the institution of proceedings. Clause 2 provides that the court, judge, justice or justices in any proceedings relating to any offence, may grant a certificate where a defendant, after a hearing on the merits is acquitted or discharged, or where, on appeal, the conviction is quashed and the defendant discharged on the information or complaint dismissed. But the certificate must specify the matters referred to in s.3. By virtue of this section the court etc. must specify that, in its opinion, if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings and that any act or omission of the defendant that might have contributed to the institution or continuation of the proceedings was reasonable in the circumstances. The class of cases in which a certificate may be granted is thus a rather narrow one. The mere granting of a certificate, moreover, does not ensure payment of costs. The Treasurer must also consider that, in the circumstances, a payment is justified and he is also to have a discretion as to the amount of the costs which are to be paid. The certificate itself is not to contain any specification of the amount of costs except that, under s.3(2), one granted by a magistrate (or justices) shall specify the amount that would be adjudged to be paid if an order was being made for costs against the informant, prosecutor or complainant. The Under Secretary is to furnish a statement to the Treasurer in which he is to state the amount specified under s.3(2), or what in his opinion are the reasonable costs, and also to specify any amounts that the applicant has received or could have received independently of the Act, by reason of incurring the costs. Then, where the Treasurer considers that "in the circumstances of the case the making of payment to the applicant is justified, the Treasurer may pay to the applicant his costs or such part thereof as the Treasurer may determine." Speaking on this discretion, on the introduction of the Bill for the Act, the Minister of Justice said that the Treasurer might decide, for example, that payment is unjustified where a person acquitted on one charge is subsequently convicted on another charge arising from the same circumstances. The discretion reserved to the Treasurer thus goes far beyond the mere questions of what costs were reasonably incurred and of what alternative means of covering them could be, or could have been, explored. It seems unfortunate that such a broad discretion is being given to the Treasury and it at least seems desirable that its exercise to refuse reasonable costs, where a certificate has been granted, should be confined to the most exceptional circumstances."

10. In Tasmania, a special Act was passed, the Criminal Proceedings (Special Defence Costs) Act 1976, in order to discharge an undertaking given by the prosecution to meet certain costs and expenses incurred in an abortive criminal trial. A fortnight later a further Act, Costs in Criminal Cases Act 1976, was enacted to make provision generally for the payment of costs in criminal cases to successful defendants. The Act provides inter alia:-

4. (1) Subject to this Act, where a person having been charged with an offence is discharged from the proceedings in respect thereof, that is to say, where -

(a) he is acquitted of the offence;

(b) the complaint charging him with the offence is dismissed or withdrawn;
or

(c) he is discharged upon an indictment for the offence.

the court having the conduct of the proceedings may, upon the application of the defendant, order that he be paid in respect of his defence such costs as it thinks just and reasonable.

(2) The court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances

and in particular to the following:-

- (a) Whether the proceedings were brought and continued in good faith;
- (b) Whether proper steps were taken to investigate any matter coming to, or within, the knowledge of any person responsible for bringing or continuing the proceedings;
- (c) Whether the investigation into the offence was conducted in a reasonable and proper manner;
- (d) Whether the evidence as a whole would support a finding of guilt but the defendant is discharged from the proceedings on a technical point;
- (e) Whether the defendant is discharged from the proceedings because he established (either by the evidence of witnesses called by him or by cross examination of witnesses for the prosecution or otherwise) that he was not guilty.

(3) No defendant shall be granted costs by reason only of the fact that he is acquitted of an offence, the complaint charging him with an offence is dismissed or withdrawn, or he is discharged upon an indictment.

(4) No defendant shall be refused costs by reason only of the fact that the proceedings were properly brought and continued.

(5) No defendant shall be refused costs by reason only of the fact that in the investigation of the offence with which he had been charged he remained silent or refused to assist in respect thereof.

11. There appears to be no overview of the current legal position for this area of the law throughout Australia. It is, however, possible to say that a successful defendant in criminal proceedings is likely to be awarded costs in cases of summary offences but with the exception of Tasmania and New South Wales not necessarily in all cases of indictable offences. It should, however, be remembered that the general availability of legal aid in cases of criminal offences is now such that the absence in Australia of statutory enactments similar to the United Kingdom's Costs in Criminal Cases Act may not be quite such a handicap as might be thought at first glance.

12. As noted, courts of summary jurisdiction are generally given a discretion to make an order for costs in favour of successful complainants or defendants. In such provisions there is usually nothing to indicate that any different principles are to be applied in awarding costs against unsuccessful parties depending upon whether they are complainants or defendants, or depending upon whether (being complainants) they happen to be police officers or not. However, there appears to be a practice whereby costs are awarded against unsuccessful defendants almost as a matter of course, whereas costs are awarded against unsuccessful complainants who happen to be police officers only in unusual circumstances, such as where the police have acted unreasonably in laying or proceeding with the complaint. Such a practice was rejected by the Full Court of South Australia as "offending against the conception of evenhanded justice" (Hamdorf v. Riddle, (1971) S.A.S.R. 398). An example of the legislation is Victoria's Justices Act 1958, which provides:-

105. The power of a magistrates' court to award costs and the award of costs by any such court shall be subject to the following provisions:-

- (1)
- (2) Where the court dismisses the information or complaint, or makes any order in favour of the defendant it may in its discretion in and by its order of dismissal or other order award and order that the informant or the complainant respectively shall pay to the defendant such costs as to such court seem just and reasonable;
- (3) The sums so allowed for costs shall in all cases be specified in the conviction or order or order of dismissal;

- (4) Any sum adjudged awarded or ordered to be paid whether to an informant or complainant or to a defendant for costs including any such sum for costs alone may be raised and levied by distress under the provisions of this Act and in the case of costs adjudged awarded or ordered on a conviction for a fine may be raised and levied by a separate warrant of distress;
- (5) When any case is adjourned the court may in its discretion order that the costs of and occasioned by the adjournment be paid by any party to any other party;

(ii) Barbados

13. Magistrates' courts are empowered to award costs by s.120 of the Magistrates' Jurisdiction and Procedure Act, Cap. 116. This is severely circumscribed as it is limited to costs other than legal costs (note s.120(11)). It is further restricted by s.120(3) where the prosecution is brought by public authorities.

14. Section 120 provides as follows:-

120. Subject to the provisions of any other enactment to the contrary, on the trial of an information or hearing of a complaint, a magistrate shall have power in his discretion to make such order as to costs -

- (a) on convicting the accused or making the order for which the complaint is made, to be paid by the accused or defendant to the informant or complainant;
- (b) on dismissing the information or complaint, to be paid by the informant or complainant to the accused or defendant, as he thinks reasonable.

(2) Notwithstanding subsection (1), where the complaint is for an order for the periodic payment of money or for the revocation, revival or variation of such an order or for the enforcement of such an order, the magistrate may, whatever adjudication he makes, order either party to pay the whole or any part of the costs of the other.

(3) No costs shall be awarded against a constable, public officer or officer in the service or employment of the Interim Commissioner for Local Government prosecuting any information or complaint in his official capacity unless the information or complaint is dismissed and the magistrate is of opinion that the information or complaint was frivolous or vexatious.

(4) Where a magistrate has dismissed an information or complaint and is of opinion that the information or complaint was frivolous or vexatious, he may also with the consent of the accused or defendant, order the informant or complainant to pay to the accused or defendant a reasonable sum, not exceeding one hundred dollars, as compensation for the trouble and expense to which the accused or defendant may have been put, by reason of such information or complaint, in addition to his costs.

(5) The consent of the accused or defendant to any such order for compensation shall be a bar to any subsequent civil proceedings for false imprisonment or malicious prosecution by him against the informant or complainant.

*W. J. ...
C. J. ...*

2 wings 15
(6) Where a magistrate has convicted an accused or made an order against a defendant, he may, in addition to the sentence or penalty, if any, imposed on such accused or defendant and to any costs ordered under subsection (1) or (2) and subject to subsections (7) and (8), order the accused or defendant to pay to the informant or complainant or any other person such compensation, not exceeding one thousand dollars, as to the magistrate may seem just and reasonable.

(7) The magistrate shall not award compensation in respect of damages for injury or loss suffered by the informant or complainant as a result of the offence or matter upon which the information or complaint was founded unless the informant or complainant or such other person consents.

(8) The award of any such compensation mentioned in subsection (7) shall release the accused or defendant from all other civil proceedings for the same cause.

(9) The amount of any costs or compensation ordered to be paid under subsection (6) shall be specified in the conviction, order or order of dismissal, as the case may be.

(10) Any order for payment of costs made against an accused or a defendant may include costs of and attendant upon his apprehension.

(11) No order for payment of costs made under this section shall include any fees to attorney-at-law.

(12) Subject to subsection (13), any sum of money awarded for costs or compensation under this section shall be enforceable as a sum adjudged to be paid by conviction or order.

(13) Any costs or compensation awarded on a complaint for an affiliation or maintenance order or for the enforcement, variation, revocation, discharge or revival of such an order, against the person liable to make payments under the order shall be enforceable as a sum ordered to be paid by an affiliation order or a maintenance order, as the case may be.

15. The High Court has a general discretion to grant costs in all cases heard by it.

(iii) Canada

16. The question is under active review in a number of Canadian jurisdictions.

17. In 1973, the Law Reform Commission of Canada in a Study Paper recommended a federal scheme for the compensation for the acquitted accused. The Law Reform Commission will be reviewing the matter in the future, but probably not before they have completed their work on the Criminal Law Review. In 1974, the Law Reform Commission of British Columbia recommended legislation permitting an award of costs to a successful defendant in cases prosecuted under provincial statutes. No action has been taken on this recommendation. The Law Reform Commission of Saskatchewan is studying the question, but has not yet reported. The Canadian Bar Association has undertaken a study of the question arising out of discussions on the issue at the 1982 Annual Meeting. The Government of Ontario is also examining the question.

18. The review in Ontario arises out of a prosecution in which in 1982, after a hearing of fifty sitting days (probably the longest preliminary inquiry in the history of Canada) a finding of no case to answer was made and a defendant discharged. Press reports estimate legal costs at £75,000.

19. The range of options tentatively identified by one Canadian researcher are as follows:-

- (a) the formalising of an ex gratia scheme, with a panel of High Court judges advising Cabinet (as recommended by the Ontario Royal Commission on Civil Rights);

- (b) conferment of judicial discretion (viz: Barbados);
- (c) conferment of judicial discretion with guidelines (viz: U.K.; New South Wales; Tasmania).
- (d) establishment of an independent tribunal along the lines of the Criminal Injuries Compensation Board (suggested in a Working Paper of the Law Reform Commission of Canada);
- (e) retrospective waiving of guidelines on legal aid to enable a successful defendant, who was not legally aided, to be granted such aid (suggested by the Law Reform Commission of British Columbia);
- (f) creation of a new tort of "improper prosecution" so as to downgrade the requirements of establishing malicious prosecution.

(iv) Jamaica

20. In common with most Commonwealth jurisdictions, there is no provision for costs as such in Jamaican law. Such compensation can only be obtained through an action for malicious prosecution.

(v) Kenya

21. The general position in Kenya is that unless an acquitted person succeeds in bringing an action for malicious prosecution, there is no power for the court to award costs against the prosecution. The Criminal Procedure Code does, however, provide by s. 171 for costs to be awarded against a person who is convicted. They may only be awarded in favour of a person who is acquitted of charges brought by a private prosecutor, provided that -

- (i) such costs shall not exceed one thousand shillings in the case of an acquittal or discharge by the High Court or five hundred shillings in the case of an acquittal or discharge by a subordinate court;
- (ii) no such order shall be made if the judge or magistrate considers that the private prosecutor had reasonable grounds for making his complaint.

(vi) New Zealand

22. The statutory basis for awards of sums of money "towards the costs" of acquitted defendants is to be found in the Costs in Criminal Cases Act 1967, s. 5 of (which applies to all courts exercising jurisdiction in criminal cases) provides:-

5. Costs of successful defendant—(1) Where any defendant is acquitted of an offence or where the information charging him with an offence is dismissed or withdrawn, whether upon the merits or otherwise, or where he is discharged under section 179 of the Summary Proceedings Act 1957 the Court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.

(2) Without limiting or affecting the Court's discretion under subsection (1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to—

- (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings;
- (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:

- (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:
 - (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner:
 - (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point:
 - (f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:
 - (g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.
- (3) There shall be no presumption for or against the granting of costs in any case.
- (4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or discharged or that any information charging him with an offence has been dismissed or withdrawn.
- (5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.

23. The costs of a convicted defendant may also be contributed to, s.6 providing:-

6. Costs of convicted defendant—Where any defendant is convicted but the Court is of the opinion that the prosecution involved a difficult or important point of law and that in the special circumstances of the case it is proper that he should receive costs in respect of the arguing of that point of law, the Court may, subject to any regulations made under this Act, order that he be paid such sum as it considers just and reasonable towards those costs.

24. Costs on appeal are provided for in s.8:-

8. Costs on appeals—(1) Where any appeal is made pursuant to any provision of the Summary Proceedings Act 1957 or the Crimes Act 1961 the Court which determines the appeal may, subject to any regulations made under this Act, make such order as to costs as it thinks fit.

(2) No defendant or convicted defendant shall be granted costs under this section by reason only of the fact that his appeal has been successful.

(3) No defendant or convicted defendant shall be refused costs under this section by reason only of the fact that the appeal was reasonably brought and continued by another party to the proceedings.

(4) No Magistrate or Justice who states a case in accordance with Part IV of the Summary Proceedings Act 1957 and no Judge who states a case shall be liable to costs by reason of the appeal against the determination.

(5) If the Court which determines an appeal is of opinion that the appeal includes any frivolous or vexatious matter, it may, if it thinks fit, irrespective of the result of the appeal, order that the whole or any part of the costs of any party to the proceedings in disputing the frivolous or vexatious matter shall be paid by the party who raised the frivolous or vexatious matter.

(6) If the Court which determines an appeal is of opinion that the appeal involves a difficult or important point of law it may order that the costs of any party to the proceedings shall be paid by any other party to the proceedings irrespective of the result of the appeal.

25. Regulations may be made prescribing the heads of costs that may be ordered and the maximum scales of costs (s.13). The court may exceed any maximum scale "having regard to the special difficulty, complexity, or importance of the case."

26. However, the Secretariat has been informed by another country that the total costs awarded between 1968 and 1972 averaged only \$1,000 per annum (i.e. about £450). As against this, in 1980 the High Court handled 2,550 indictments or informants involving 989 distinct persons, and in 1979 the Magistrates' Courts handled 295,612 cases. It appears that costs are seldom awarded, and that where they are, only modest sums are ordered.

(vii) Nigeria

27. Section 32 of the Constitution of the Federal Republic of Nigeria 1979 guarantees the right to personal liberty and, among other things, deals with arrest, detention and bail of persons arrested by the police or charged before the Courts. The Criminal Procedure Act (Cap. 43 of the Laws of the Federation - applicable to the Southern States) and the Criminal Procedure Code (Cap. 89 of the Laws of Northern Nigeria - applicable in all the ten Northern States) have complementary provisions.

28. Specifically, section 299 of the Criminal Procedure Act (Cap.43) enjoins the Court in giving its decision at the conclusion of a trial, in addition to either discharging or convicting the accused, also to make such other order as to it may seem just. In addition to the foregoing, the following ancillary orders, (inter alia) may be made in favour of the victim of an offence or against the convicted accused, as the case may be:-

(a) On Acquittal: Costs against a private Prosecutor

Section 258 provides that where an accused person is acquitted or discharged in a prosecution originally instituted on a summons or warrant issued by the court on the complaint of a private prosecutor, not being a person prosecuting on behalf of the State or any public officer prosecuting in his official capacity, the court may order the private prosecutor to pay to the accused such reasonable costs as it considers proper unless the court is of the view that the private prosecutor had reasonable grounds for starting the prosecution. This provision is subject to any other provision in any written law relating to the procedure to be followed in awarding of costs.

(b) Compensation to the accused for false and vexatious charge

Section 256 provides that if the court discharges or acquits any accused person and the judge or magistrate is of the opinion that the accusation against him was false and either frivolous or vexatious, the judge or magistrate may for reasons to be recorded, order compensation of a specified amount, not more than N20 to be paid to the accused person by the complainant.

29. The accused may refuse to accept the compensation under (b) but where he accepts it, the accused is precluded from any civil action in respect of the same injury,

30. The Northern Nigeria Criminal Procedure Code contains provisions corresponding to the foregoing.

31. Mention should also be made of the novel provisions of subsection (6) of section 32 of the Constitution which reads:-

"Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; and in this connection, "appropriate authority or person" means an authority or person specified by law."

(viii) United Kingdom

32. The material available suggests that in the Commonwealth the U.K. is the jurisdiction in which a successful defendant is most likely to have all or a part of the costs he has incurred reimbursed.

33. The power to award costs in criminal proceedings depends on statute and is governed mainly by the Costs in Criminal Cases Act 1973, under which the court may order payment of costs out of central funds to the prosecutor and to a successful defendant and payment of costs by one party to the other. Costs out of "central funds" should normally be awarded to a successful defendant unless there are positive reasons for making a different order. An order may be made notwithstanding that the defendant has been granted legal aid. "Central funds" simply means money provided by Parliament.

34. In a Practice Note [1973] 2 All ER 592, the then Lord Chief Justice, Lord Widgery, stated -

"Although the award of costs must always remain a matter for the court's discretion, in the light of the circumstances of the particular case, it should be accepted as normal practice that when the court has power to award costs out of central funds it should do so in favour of a successful defendant, unless there are positive reasons for making a different order. Examples of such reasons are:-

- (a) Where the prosecution has acted spitefully or without reasonable cause. Here the defendant's costs should be paid by the prosecutor.
- (b) Where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it really is. In such circumstances the defendant can properly be left to pay his own costs.
- (c) Where there is ample evidence to support a verdict of guilty but the defendant is entitled to an acquittal on account of some procedural irregularity. Here again, the defendant can properly be left to pay his own costs.
- (d) Where the defendant is acquitted on one charge but convicted on another. Here the court should make whatever order seems just having regard to the relative importance of the two charges, and to the defendant's conduct generally."

35. As has been observed by a number of writers, a decision by the court in exercise of such a discretion can involve an interpretation of a "not guilty" verdict, either as amounting to "not proven" or as being technical in nature and therefore undeserved. It can therefore place a gloss on the verdict, casting doubt on the verdict and thereby undermine the presumption of innocence (see, e.g. 40 Australian Law Journal (1967) at page 411).

36. Where a court has exercised its discretion in favour of making an award of costs out of central funds there is no further discretion to limit the amount awarded. Any provision of the Costs in Criminal Cases Act 1973 enabling any sum to be paid out of central funds, however, has effect subject to regulations prescribing rates or scales of payments of any costs so payable and the conditions under which such costs may be allowed.

37. Where costs are ordered to be paid out of central funds costs may be allowed as follows in respect of:-

- (1) a witness for attending to give professional evidence, an allowance not exceeding the prescribed maximum and, where appropriate, a night allowance not exceeding such maximum;
- (2) an expert witness for attending to give expert evidence and for work in connection with its preparation, an expert witness allowance of such amount as the court considers reasonable;
- (3) a seaman who misses his ship for the purpose of attending to give evidence, an allowance in respect of loss of wages and maintenance;
- (4) a witness other than those named under heads (1) to (3) who attends to give evidence, a subsistence allowance in accordance with the prescribed scale and, where appropriate, a loss allowance not exceeding the prescribed maximum;
- (5) a witness who travels to or from court by public conveyance or private motor vehicle, a travelling allowance as prescribed;
- (6) a person employed as an interpreter, such allowances as the court may consider reasonable;
- (7) any prosecutor, defendant or appellant, or party to proceedings before a Divisional Court of the Queen's Bench Division, the same travelling and subsistence allowances as if he had attended to give evidence other than professional or expert evidence.
- (8) any other person who in the opinion of the court necessarily attends for the purpose of the case otherwise than to give evidence, the same allowances as if he had attended to give evidence other than professional or expert evidence;
- (9) a written report made by a registered medical practitioner in pursuance of a request by the court, a medical report allowance in accordance with the prescribed scale.

B. COMPENSATION FOR PERSONS WRONGFULLY CONVICTED

(ix) General

38. We are not aware of any Commonwealth jurisdiction which has a statutory scheme providing for compensation for persons who have been wrongfully convicted. It has, however, been suggested that in Nigeria such a person might seek redress under the Fundamental Rights provisions of the 1979 Constitution.

39. A number of Commonwealth countries are, however, party to the UN International Covenant on Civil and Political Rights, Article 6 of which provides:-

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

40. It has been suggested that this Article imposes upon a signatory an obligation to provide a statutory basis for such compensation as has been done in a number of European countries (cf. Compensation for Wrongful Imprisonment, JUSTICE, 1982).

41. Instead, Commonwealth jurisdictions have up till now dealt with the matter on an ex gratia basis, although a Royal Commission in New Zealand in 1980 was asked to suggest appropriate compensation, "if any", for a person convicted of two murders and subsequently granted a free pardon after serving eight years' imprisonment. Its recommendation of approximately NZ\$1,87,450.35 (£450,000), and which also embraced members of Thomas's immediate family, was accepted by the Government.

42. In 1982, a report by JUSTICE (the British Section of the International Commission of Jurists) published a report entitled Compensation for Wrongful Imprisonment. It cites the following extract from a letter from the Home Secretary as being "the clearest statement of the position" in a case in which the Home Secretary has not intervened:-

"The law makes no provision for...payments to persons acquitted in the ordinary process of law, whether at trial or an appeal. If someone thinks he has grounds for compensation his legal remedy is to pursue the matter in the civil courts, by way of a claim for damages. In exceptional circumstances, however, the Home Secretary may authorise an ex gratia payment from public funds, but this will not normally be done unless the circumstances are compelling and there has been default by a public authority."

43. The JUSTICE Report recommends the establishment of an Imprisonment Compensation Board to deal with such cases, with the following guidelines:-

- (a) After the Board has accepted a claim as falling within its jurisdiction and being worthy of consideration it may refuse or reduce compensation if it considers that:-
 - (i) a conviction has been quashed on grounds that the Board regard as being a mere technicality;
 - (ii) it would be inappropriate in view of the imprisoned person's conduct in respect of the matters which led to the criminal proceedings;
 - (iii) the applicant has failed to give reasonable assistance to the Board in its efforts to assess compensation.
- (b) In respect of paragraphs (a)(i) and (a)(ii) above the Board will normally only consider evidence which was advanced at the trial or at the hearing of the appeal, except that it may consider and take into account matters which have come to light in the course of a subsequent investigation.
- (c) Where the applicant's claim is accepted as coming within the provision of the scheme the Board will grant compensation for:-
 - (i) expense reasonably incurred in securing the quashing of the imprisoned person's conviction;
 - (ii) loss of earnings by the imprisoned person or any dependant person where such loss is a direct consequence of the imprisonment;
 - (iii) any other expenses or loss which are reasonably incurred upon imprisonment either by the imprisoned person or any dependant person;

(iv) pain suffering and loss of reputation suffered by the imprisoned person or by the imprisoned person's dependants,

The Board will reduce any award by the amount of any other compensation or damages already received by the claimant.

- (d) Compensation will not be paid if the assessment is less than £250.
- (e) A person compensated by the Board will be required to undertake that any damages, settlement or compensation he may subsequently receive in respect of his wrongful imprisonment will be repaid to the Board up to the amount awarded by the Board.

Chronicle - Herald
Tuesday, Sept 11th

09-84-0256-01

Neither side will comment

By DEAN JOBB
Staff Reporter

Nova Scotia's attorney-general and the lawyer for Donald Marshall Jr. declined comment Monday on a report the provincial government will offer \$270,000 in compensation to the Micmac Indian who served 11 years in prison before being cleared of murder.

CBC News, quoting anonymous sources, said Monday night Marshall will get \$170,000 to compensate for time wrongly spent behind bars and a further \$100,000 to cover the legal fees needed to prove he was innocent of a 1971 Sydney stabbing.

Reached at his Truro home last evening, Attorney General Ron Giffin said "I don't know where they got that," but refused to comment on the accuracy of the figures.

Giffin said the government would not be making any announcements on the Marshall case "until we're ready," adding he expected an official statement would be made, probably at a press conference, "in the very near future."

Marshall's lawyer, Felix Caccione, would say only "the matter is not resolved," and to his knowledge, was still being dealt with by the attorney-general's department and Mr.

Justice Alex Campbell of Prince Edward Island, the one-man commission appointed in March to study the compensation issue.

According to the CBC report, Mr. Justice Campbell had approved of the amount of compensation, which was to be made conditional on Marshall agreeing not to bring a lawsuit against the City of Sydney.

At the request of Mr. Justice Campbell, the provincial government paid the 30-year-old Marshall a \$25,000 advance in April pending the commission's final report, originally slated for completion this fall.

Serving a life sentence for the second-degree murder of teenage friend Sandy Seale, who was stabbed to death in a Sydney park, Marshall was acquitted in May, 1983, by the Appeal Division of the Nova Scotia Supreme Court.

Evidence that witnesses had committed perjury at Marshall's trial, coupled with indications information was withheld from the defence, led to calls for a full investigation of the circumstances surrounding the case.

After a long silence the Nova Scotia government responded with the appointment of Mr. Justice Campbell, who was directed to concentrate on the issue of compensation.

AG, lawyer decline comment

Tuesday, September 11, 1984 THE MAIL-STAR 3

By Dean Jobb
Staff Reporter

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Nov 21st 1983

Mr. Harry How;
Q.C. M.H.A.

Dear Sir:

I'm writing
to you concerning Donald
Marshall J.R. case: asking
Ottawa for compensation to
which they refused.

Marshall was convicted in 1971
of murdering his friend Sandy Seale
Due to the fact and in my own
opinion he lied to the Court.

So why should the taxpayer
or the Provincial Govt -
pay him compensation.

At present Marshall is
employed on the Shubenactie
reserve outside Halifax as a plumber

Thank you kindly
Yours truly

Joseph Francis Boudreau
West Arichat
Richmond County N.S.

730E-350.

09-84-0258-01

Nov 21st 1983

copy
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BOE-350.

09-84-0258-01

Brad O' C, B,
Nov. 22 / 1983

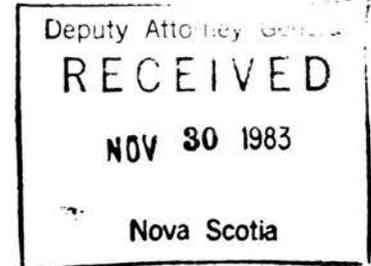
Honorable Ron Giffin M.L.A.

Dear Sir, I am writing you concerning Donald Marshall case seeking compensation. I don't think he should get anything. Coming to the point, how many years in prison would he have got for Ernest Rabbery. Also why not check into his record before the incident happened. What kind of character was he before the incident and also in prison. Also Marshall family looking for compensation because of discrimination, what do you think the Sandy Seale family is going through after all these years, opening the case up again, and the fact that Marshall lost eleven years of his life; Seale lost them all.

Thank you.
Kevin Bandman.
RR#1 Brad O' C
Box 245
C.B. N.S.

P.O. Box 365
 Lockeport, Nova Scotia
 BOTILO, Nov. 27, 1983

Attorney General,
 Government of N.S.,
 Halifax



Dear Sir,

This letter deals with the Donald Marshall case. It makes me both angry and ashamed over the handling of this matter.

From the evidence and information that has been released during the past several months, one can only conclude that Mr. Marshall was 'railroader' into jail. This makes me feel angry that an innocent man was sent to jail. Thankfully, this country does not believe in capital punishment.

I feel ashamed because the politicians, both federally and provincially, that we elected, are passing the buck. Mr. Marshall and the public has been hearing nothing but political jargon. Doesn't anyone feel that justice must be served? Proue that this is a just society and admit a mistake was

made.

There are demands for an inquiry. I personally feel that would prove both lengthy and expensive. Let Mr. Marshall get on with his life debt free.

Try to imagine spending eleven years in a maximum security prison knowing you are innocent:

Please do not answer this letter with a form reply that your office is looking into this matter. Admist there has been a miscarriage of justice and compensate Mr. Marshall. \$ 82,000 is a drop in the bucket to the government. At least it would show the public and perhaps instill some faith in our government leaders.

I trust and pray that a just decision will be made shortly.

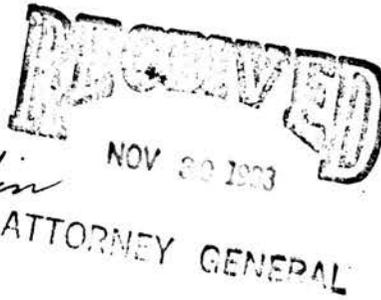
Respectfully,
Elizabeth Adler

09-84-L258-01
2. Nov 1983



DOMINIC ROLAND HILL
112 FLYING CLOUD DR
DARTMOUTH N.S.
B2W 4T3

Attorney General
Province of N.S.
The Hon R.C. Giffin



Dear Sir;

For your consideration in respect to the payment of legal fees or court costs for Donald Marshall.

Considering Mr Marshall's acknowledged intention to commit a felony on the night of the murder, his deliberate deviousness during his first trial and the Judges observation that he was personally responsible for all his own problems I will take very great exception to any financial assistance, to Mr Marshall, from Government Funds.

Thank you.

D. R. Hill

Justice is not yet complete

Donald Marshall is now a free and exonerated man.

Twelve years after the Cape Breton man was convicted and imprisoned for murdering a friend, and in the light of overwhelming evidence that the conviction was a glaring error, the Nova Scotia Supreme Court has acquitted him.

Complete justice has not, however, yet been done. Nor will it be until Mr. Marshall's legal fees of \$79,000 have been paid and the conduct of the Sydney police force which initially charged him has been thoroughly investigated.

Mr. Marshall, who after 11 years in prison is now on welfare, cannot pay his fees. Nova Scotia says it will pay only the standard \$3,000 legal aid grant. John Munro, federal Indian Affairs minister, had said Ottawa would pay the fees (Mr. Marshall is a Micmac Indian). No money, however, has been forthcoming — apparently partly because Ottawa feels, with some justice, that the provincial government should pay because it is responsible for the administration of justice.

Meanwhile Mr. Marshall's lawyer, Stephen Aronson, has had to take a job in the federal civil service to cut his losses on the Marshall case. That is an appalling

commentary on our system of justice.

Ottawa at least understands that the state should pay these fees, since the state created the need to incur them. It should therefore pay them and then seek to recover the money from Nova Scotia.

Meanwhile, an even graver blot on the judicial system remains: the failure to launch any investigation into the conduct of the Sydney police force, even though three witnesses have testified that Sydney policemen pressured them into false (and crucial) testimony in the 1971 trial.

The two officers in question are now Sydney's police chief and chief of detectives. Neither the Nova Scotia government nor the provincial police commission has shown the slightest interest in investigating the grave allegations against them.

Sydney Indians are restive. It is hard to blame them. One suspects the police would have been investigated long ago if Mr. Marshall had been white.

But his race is not important. What is important is that sworn statements attesting to such serious police misconduct must never go uninvestigated. Only in a police state are the police held to be above the law.

Montreal Gazette

May 12/83

EDITORIALS

Case not closed

The case of Donald Marshall still has not been concluded, even though someone else has at last been convicted of the killing for which Mr. Marshall served 11 years in prison.

The matter will remain a blot on Canada's judicial and moral record until Mr. Marshall has been paid the \$82,000 in legal fees incurred to prove his innocence and, even more important, until the apparently strange conduct of the police force which originally charged him has been thoroughly investigated.

Mr. Marshall is the Nova Scotian man who in 1971, at the age of 17, was convicted of murdering his friend Alexander Seale in Sydney. Not until this year was he able to win a retrial which found him innocent. Now Roy Ebsary of Sydney has been found guilty of killing Mr. Seale.

The judge who acquitted Mr. Marshall this spring said he was largely responsible for his original conviction because he lied at his trial (he denied being in the park where the fatal stabbing occurred when in fact he and Sandy Seale were attempting to rob Mr. Ebsary there). But any fault of Mr. Marshall does not excuse the fault of others involved in this case.

Crucial witnesses have testified that

two Sydney policemen pressured them to give false testimony in the 1971 trial. The two officers are now Sydney's police chief and chief of detectives. But, in an outrageous display of indifference, responsible authorities have shown no interest in investigating their conduct. It has been left to Mr. Marshall to take legal action against the city and the police force.

All this legal action has cost Mr. Marshall a great deal of money — \$82,000. yet the state, which created the need to pay these fees, will not reimburse them. Nova Scotia refuses outright. The federal minister of Indian affairs, John Munro, said Ottawa would pay (Mr. Marshall is a Micmac Indian) but has since reneged.

Meanwhile Mr. Ebsary — whose own daughter testified that he spent hours sharpening knives in the basement, once ripped the head off her pet budgie and killed her cat; who in 1971 swore he would kill the next person who mugged him; and who allowed an innocent man to spend 11 years in prison — has been released without bail until sentencing.

He is admittedly, old (72) and sick. But Donald Marshall lost 11 of his best years of young adulthood. Does he not deserve at least the knowledge that his society is willing to face all of its responsibilities?

09-83-0638-09 Cape North P.O.
N.S. BOCICO

Nov 25, 1983

DEC 1 1983

ATTORNEY GENERAL

Hon. Ronald C. Griffin
Attorney-General,
Province House,
Halifax, N.S.

Dear Sir: Enclosed are two clippings from the Montreal "Gazette", dated almost exactly six months apart, yet making the same points. I am sending both to emphasize that time has been allowed to pass and nothing has been done on these matters.

There is currently a good deal of discussion on the payment of Mr. Marshall's legal fees, but I hear nothing on the question of the behavior of the Sydney police officers mentioned. Let others argue as to whether the nation or the province should foot the bill — I am concerned with what the "Gazette" calls "an outrageous display of indifference" — "neither the Nova Scotia government nor the provincial police commission has shown the slightest interest." The "Gazette" concluded, last May, "Only in a police state are the police held to be above the law."

May I urge that as the new Attorney-General you take steps to investigate the behavior of the Sydney police in this matter.

Yours very truly,
Mary D. Cox

B.S. will refer to...

09-84-0258-01

H.Holt, P.Eng.
902-165 Ontario St.
Kingston K7L 2Y6

27.Nov.83

The Hon. Harry How. Q.C.
Attorney General of Nova Scotia.

RECEIVED
DEC 2 1983

re: Donald Marshall

ATTORNEY GENERAL

Dear Sir,

Donald Marshall has been in jail for 11 years, from age 17 till 28 - the best years of our life. Now that it has been proved that he was totally innocent and that a grave error of justice had occurred, every one is sorry for him, Federal and Provincial government alike.

But there is embarrassed silence when it comes to the question of compensation. Of course nothing can really compensate for a life sentence, but the very least is restitution of legal costs and a cash settlement or life annuity.

We are shocked; we think Canada is a civilized country, we think Nova Scotia a civilized province, but it does not appear to be so!

Please act now and quickly to avoid further embarrassment. The next step after this, is to enact legislation which makes it a matter of course to compensate people who are victims of justice gone astray. Remember Canada IS a civilized country after all!

Respectfully and sincerely

yours



...specially one who is will-
...commit suicide, is almost
...able to stop."
He said that many threats had
been made against the embassy in
the past but no warning had been
given of the recent attack.

Meanwhile, an Iranian Foreign
Ministry spokesman, in a Tehran
Radio broadcast monitored in Lon-
don, said the bombings had "no
connection whatsoever" with Iran.

Responsibility for the series of
blasts was claimed by a pro-Iranian
group called Islamic Holy War,
which also claimed to have set
bombs in Beirut in April and Octo-
ber that killed 361 people, most of
them U.S. and French troops.

U.S., French, British and Italian
troops make up the multinational
peacekeeping force in Beirut.

U.S. Marines in full combat gear

MELBOURNE, Australia
(Reuter) — Melbourne's pio-
neering test-tube baby scien-
tists have rejected overseas
requests that they attempt to
grow human embryos to pro-
vide medical "spare parts,"
the team leader said yesterday.

Professor Carl Wood said his
team had been asked to help
research into the use of organs
and tissue from embryos in
transplant and graft surgery.

Prof. Wood, head of the
Queen Victoria Medical Centre
in vitro fertilization team, did
not say who made the requests,
but said: "We've had two over-
seas approaches from people
who believe the IVF techniques
could be used to grow embryos
beyond the five- or seven-day

stage that we have limited
ourselves to.

"There would have to be a
change in community attitudes
before we would begin to con-
sider being involved in the
work."

Prof. Wood said although
spare-parts procedures might
benefit the sick, they would
result in the death of the em-
bryo.

IVF involves fertilizing an
egg outside the body and rein-
serting it in the womb.

The Government of Victoria
state has lifted an eight-month
ban on certain techniques being
developed by the Melbourne
team — a ban imposed partly
because of the possible conse-
quences.

year-old war between Iran
Iraq.

Gulf leaders quickly conferr-
telephone and voiced support
Kuwait. Some diplomats said
attacks might strengthen the
solve of the six-nation Gulf Co-
tion Council, formed in 1981 p
as a result of the rebellion in Ir-

The Council is made up of
wait, Saudi Arabia, Bahrain, Q
the United Arab Emirates,
Oman.

Mr. Griffin said U.S. fore-
experts were coming to Kuwa
investigate the bombing.

He said one U.S. company
moved its American personnel
dependents yesterday "but this
not done upon recommendation
the U.S. Embassy."

The U.S. business commu-
numbers about 2,500 in Kuwait.

AROUND THE WORLD

09-83-0638-09

Canadian given suspended sentence

ANKARA — A Canadian accused of insulting
Turkish President Kenan Evren has been sen-
tenced to a suspended 10-month prison term in
the western city of Denizli, his lawyer, Veli Deve-
cioglu, said. Bernard Beaulieu, a Quebec Govern-
ment computer technician, is expected to be
able to leave Turkey when the appeal process
becomes final in a week's time, Mr. Devcioglu
said. The defence does not plan to appeal, but
prosecutors can file an appeal within a week af-
ter the court's verdict. Mr. Beaulieu was charged
with insulting General Evren while watching the
President on television in the lobby of a hotel in
Denizli.

Rec 14/83

Man is set free on new evidence

LONDON — Two legal appeals, a television
documentary and years of campaigning by pres-
sure groups have finally resulted in the release
from prison of a man wrongly convicted of mur-

der. Mervyn Russell, 39, may get as much as
\$100,000 in compensation for the six years he
spent in prison. Mr. Russell was jailed for life in
1977 for stabbing 20-year-old Alison Bigwood to
death. Last week the court set him free after
hearing new pathological evidence that showed
the handful of hair found in the victim's hand
could not have been Mr. Russell's.

Yugoslav minister is dismissed

BELGRADE — The Yugoslav Government has
announced that Finance Minister Jozef Florijan-
cic will be dismissed, but said he will be given
another Government post. It gave no reason for
what Western diplomats consider a highly unusu-
al move, but sources said Mr. Florijancic had
resigned because of a dispute over next year's
budget and planned financial reforms.

Bolivia paralyzed by general strike

LA PAZ — Bolivia was virtually paralyzed
yesterday by the second general strike in three
weeks, union sources said. Public transport was
working to some extent in the capital, but other
public services and virtually all private business
came to a halt at the start of the 48-hour stop-
page. Unions want the Government to raise the
minimum monthly wage to \$240 from the current
\$62 to cope with sharp price increases.

100 Nicaraguan rebels accept amnesty offer

MANAGUA — More than 100 U.S.-backed
rebels have handed themselves over to Nicar-
guan authorities, accepting an amnesty offer
from the Sandinista Government, Victor Tera-
of the ruling junta said yesterday. He said the
rebels, who were present at the negotiations at
the city of Esmeraldas, had been offered a
full pardon by the Government. The rebels
had been fighting against the Sandinista

said those accepting will be allowed to take
in 1985 elections.

Dynamite bombs rock U.S. recruiting office

EAST MEADOW, N.Y. — Two dynamite
bombs hidden in attache cases rocked a
Island building that houses a U.S. Navy re-
cruiting station moments after 170 occupants
response to a telephone threat. No injuries
reported. A group calling itself the United
Front claimed responsibility for the blast.
The four-story building in East Meadow, off
said. The group also issued a communiqu-
cizing U.S. actions in South and Central Ame-

Two bombs planted in British cities

LONDON — A small bomb demol-
ished an unoccupied telephone booth last night in
a few hours after police cleared out thou-
shoppers so the bomb squad could detonate
kilogram charge planted in a busy London
Police blamed the Irish Republican Army
London bomb, but there was no immed-
cation as to who was responsible for
sion in Oxford. No group immediately
responsibility for either bomb.

Four bombs exploded on Chilean protest d

SANTIAGO — Terrorist explosions
yesterday, including one that
train, on a Day of National Ind-
protest against the Chilean military
ment's new mining law. A terrorist
one of an 18-car freight train
may hit head-on Sunday
of San Antonio
aged in Santiago
the protests in Chile

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Marshall's Appeal Lawyer Says He Didn't Receive New Evidence

By JOHN CAMPBELL
Staff Writer

C.M. Roseblum, the Sydney lawyer who represented Donald Marshall Jr. in his appeal back in 1972, said Wednesday that he went into the appeal unaware that new evidence had come to light in the weeks following Marshall's conviction of murdering Sandy Seale.

Provincial Court Judge D. Lewis Matheson, an Assistant Crown Prosecutor at Marshall's original trial, told the Post earlier that he believed the defence lawyer would have been informed by the late Donald C. MacNeil, the Crown Prosecutor in charge of the case.

But Mr. Roseblum, who is vacationing in Florida, told the Post in a telephone interview yesterday that he was not told of the new evidence.

Meanwhile, an RCMP officer who took part in the investigation of the new evidence has decided not to talk publicly about the case unless he gets permission from his former superiors.

Gene Smith, now director of security with Irving Oil in Saint John, New Brunswick informed the Post that he will honor the oath of secrecy taken as a Mountie until he's officially released from it.

Smith was one of two Mounties who took part in the investigation which was turned over to the RCMP by Sydney Police, through the Crown Prosecutor's office. The in-



Mr. Rosenblum

quiry included lie detector tests.

Judge Matheson recalled that the Crown Prosecutor was away from the city when James MacNeil came forward with his new evidence 10 days after Marshall's conviction. He remembers contacting N.R. Anderson, director of criminal prosecutions with the the Attorney-General's Department in Halifax at the time. Now a County Court Judge, he has been quoted as saying he does not recall the MacNeil statement.

Judge Matheson said the new evidence seemed "Dramatic" to him, but may have seemed "routine" to Judge Anderson at that point.

The Attorney General at that time, Leonard Pace, was appointed to the Supreme Court shortly after, and was one of

the three Justices who heard the unsuccessful appeal of the Marshall conviction in January of 1972. Judge Pace was quoted this week as having "no personal recollection" of the 1971 incident and not having been involved, because of department procedures at the time.

Not Aware

Judge Matheson was not aware whether the Crown Prosecutor had ever received any formal, official report from the Attorney-General's department as a result of the RCMP investigation it ordered into the new evidence. Case files, he said, are normally returned to the police, not filed by the Prosecutor's office.

Sydney Police Chief John MacIntyre testified during the second trial of Roy Newman Ebsary last November that as the officer in charge of the investigation that led to Marshall's conviction, he felt the investigation of the new evidence was best handled by RCMP, to avoid any conflict of interest.

The chief testified that his involvement with the case ended when the new evidence was turned over to the Crown Prosecutor's Department in November of 1971.

However, the Sydney Police Department has preserved its file on the original investigation and the introduction of the new evidence as well.

A Canadian Press report meanwhile quotes

Innis MacLeod, Nova Scotia's deputy Attorney-General at the time, as saying that Marshall's lawyers should have been notified before his appeal that an eyewitness had come forward with information that could clear Marshall.

MacLeod said he had no recollection of an RCMP review undertaken in 1971 when James MacNeil came forward after the trial. MacNeil had not testified at Marshall's trial.



Judge Matheson

Marshall served more than 11 years in jail for the 1971 stabbing death of his friend Sandy Seale in Wentworth Park before it was found last year that another man, Roy Newman Ebsary, was the real killer. Ebsary was later convicted of manslaughter in connection with Seale's death.

MacLeod said he had no recollection of an RCMP

review undertaken in November 1971 when James MacNeil came forward after the trial and told investigators that his friend Ebsary was actually the killer. MacNeil had not testified at Marshall's trial.

RCMP ended the review after Ebsary passed a lie-detector test and results were inconclusive on MacNeil.

The former deputy attorney general said he would expect MacNeil's information would have been transmitted to the defence lawyers. He said his department kept a general eye on criminal proceedings but local crown prosecutors "pretty well ran the show in the city where they prosecuted."

Marshall's current lawyer, Felix Cacchione, has asked for a full public inquiry by the attorney general's department into the handling of the initial investigation, at which three crown witnesses gave false statements. Two of the crown witnesses have said they were pressured by investigators into giving the statements.

Other justice officials involved in the originals trial either had no recollection of MacNeil's statement in 1971 or thought Marshall's lawyer had been notified.

An attorney general's department official said Monday the file on Marshall's original case has been destroyed under routine department procedures.

ney has

Seek redress over rights, judge says

An Alberta judge has ruled that an accused man whose constitutional rights were violated when he was jailed for five days can seek state compensation.

Mr. Justice David McDonald of the Alberta Court of Queen's Bench ruled that Denis Germain can ask for money as a remedy for the violation under the Charter of Rights and Freedoms or can ask, if convicted of the charge against him, for a shorter sentence than would otherwise be imposed.

Mr. Germain was jailed for contempt after he appeared in provincial court without a lawyer. His explanation that he could not afford a lawyer and had been unable to obtain legal aid was rejected by Provincial Court Judge Lucien Maynard, a former attorney-general of Alberta.

Judge McDonald said the section of the Charter providing for infringement remedies "must be given a generous interpretation," although he added that only in unusual and special cases should proceedings against an accused be quashed.

Mr. Germain's case was not an example of one in which charges should be dismissed, because the assault charges against him are serious, the judge said.

Judge McDonald, best known nationally as the head of a royal commission that investigated wrongdoing by the RCMP, said:

"The conduct of the accused did not constitute a contempt of court. . . . The power of any court to find a person guilty of contempt of court is one that must be used with great prudence. . . . What occurred in the present case was an abuse of the summary power of punishing for contempt."

But in his recent ruling, Judge McDonald stopped short of awarding Mr. Germain damages for infringement of his rights. Instead, the judge denied Mr. Germain's request that the assault charges still pending against him be quashed and invited Mr. Germain "to seek other relief," such as asking specifically for a monetary award.

David Midanik, an Edmonton lawyer now representing Mr. Germain, said in an interview he still is considering the options. A trial date for the four assault charges against Mr. Germain is to be set in September in St. Paul, about 120 miles northeast of Edmonton.

Judge McDonald elaborated at some length on the availability of monetary compensation as a possible remedy to a Charter violation. He said the existence and scope of this remedy have not been explored in detail in any previous decision under the Charter.

"It was necessary to demonstrate that it forms part of the armory of remedies that may be just and appropriate when there has been an infringement of a right guaranteed by the Charter," Judge McDonald said.

He ruled that Judge Maynard did not make plain to the accused the nature of the contempt with which he was being charged.

"Here, the accused was deprived of his liberty by a procedure that was not in accordance with the principles of fundamental justice, which require that the specific nature of the complaint against him be distinctly stated and that he be given an opportunity of answering it," Judge McDonald ruled.

Judge McDonald said there may be circumstances in which dismissing a charge will be a just remedy for an infringement of a Charter right. But when the offence is serious, like the one in question, this might not be the best remedy because it would foster a sense of injustice in the community, Judge McDonald said.

"I think that a just remedy in the context of the criminal law is one which, while furthering the object of the right guaranteed by the Charter that has been infringed, nevertheless does that, as far as possible, in a way that does not offend the reasonable expectations of the community for the enforcement of the criminal law," the judge said.

"Moreover, the remedy, to be just, must be otherwise consistent with other values enshrined in the Charter that are designed to protect an egalitarian pluralistic society that is free and democratic."

Mr. Germain is alleged to have assaulted four people on July 18, 1983. The most serious of the alleged assaults, Judge McDonald said he was told, resulted in the loss of sight in one of the victim's eyes.

After two months and a few Provincial Court appearances, Mr. Germain appeared before Judge Maynard on Sept. 12, 1983. Mr. Germain said he couldn't get a lawyer because he didn't have money and hadn't qualified for legal aid. Judge Maynard cited him for contempt.

happens. centre does not hold. an city built before the seems held together by with short rectangular litions since then have discontinuous road syst- ark of the modern sub- sities are usually much in the centre of cities, e has apartment build- converted to flats and s while suburbs are ngle-family houses on

forms hold true for for the densities. The is fewer people living in an the suburbs. In the Council has allowed so on houses to be built on so lax — often none- e downtown has been This city suffers from as Detroit: its centre and virtually destroyed urban development.

Approval divisions

er of empty lots down- now overlooks two full lots which never fill up cause of all the compet- morning jog, I go by as s as buildings. Residen- tial activity has spread t the city almost falls ty spaces. As Alan Arti- the Institute of Urban niversity of Winnipeg an't solve its problems like most other cities, no growth. Winnipeg sulation of about 600,000 us are that it will stay -sted in the city are on- to this problem of h has gone too far.

Social Planning ount be called a radical sts that City Council not suburban housing until ntown housing is fully isions, he notes, require when people leave the ty good schools must e city should stem such e resources by refusing to oney into suburban ser- that would save public renthgen the downtown. councillors see their job nd development, this is only laugh at, even ve the city.

a Initiative is another to grips with the entropy ves the three levels of ederal, provincial and n expenditure of almost a five-year period. Most v Axworthy, the power- et minister from Winni- the parties together and ree governments kick in oney.

Shes ions sought

is a potpourri of pro- e limited land develop- eet beautification and mprovement schemes. nces a host of communi- ring a range of needs mer psychiatric patients ve Indians, seniors and s. There are programs and job retraining. The tive tries to address so- ic problems as well as with the more tradition- physical change.

own allotments but, bal- sly between the three nents, the Core Area In- nce other public expendi- has meant some co-ordi- vernments act, it has not Council has changed its urban approvals. Every- e area approach, but not let their concerns for an own affect the rest of ivities. ntinues to languish, and re sought. Like the North e. More on that tomor-

had high death rates: study

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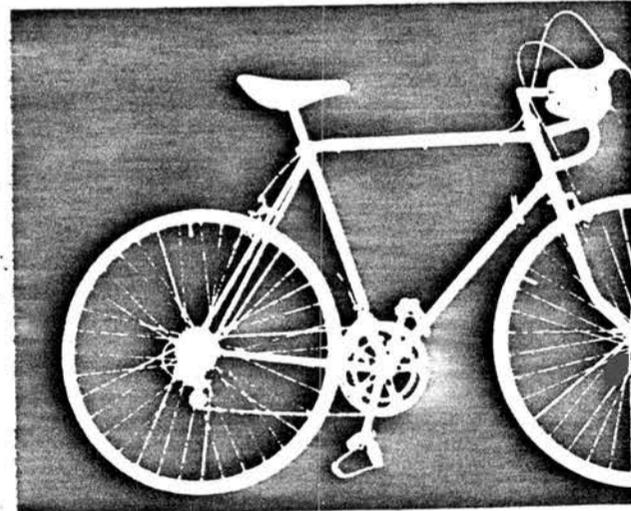
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Why we had the made to our speci



In a sense, our customers built this bicycle. Over the years we've listened to our customers tell us what they like in a bicycle, and what they don't like, what they'd like to see more of (and even what they'd like to see less of). Combining these ideas with our own expertise, we've been able to exchange notes and make pertinent suggestions to leading bicycle makers around the world. Ultimately, this led to a bicycle being designed and meticulously built to our exacting specifications, by a leading Japanese maker. The Sakai represents everything Bloor Cycle likes to see in a bicycle. A simple but functional design, built with high quality components for superior performance. The result has been not one Sakai, but several, for different types of riders. The Sakai Star is an excellent bicycle for recreational cyclists, as is the Sakai Spirit for commuters. There are two Ultra is a world-class and the Sakai Landma bike. Each represents - Indeed, due to ou bicycles available at the Sakai Spirit to \$6 and racing bicycles. Our experience w you. Not only for the height and weight, a And, despite our two firm check-ups Like all our bicycles and our free, writt Sakai bicycles are Which is only right.

5. In another situation that was reviewed in the courts, a corporation was formed with the objective of overseas marketing of liquefied petroleum gases. The essential preliminaries to the carrying on of this business in an active way included assurances of supplies from producing oil companies, plans for extracting, gathering, and transporting the gas to seaboard by pipeline or other means, the obtaining of export permits, arrangements for refrigerated storage and loading facilities at the seaboard and transport for shipments overseas, and the negotiating of firm contracts with overseas buyers. It was held by the courts that this corporation commenced business when these preliminary studies and negotiations were undertaken even though, in the end, the project was abandoned. The fact that no revenue was generated during this period was held not to be a significant consideration in determining whether the business had commenced and was being carried on.

Expenditures Prior to the Commencement of a Business

6. Expenses in respect of a proposed business that are incurred prior to the commencement of the business do not constitute a business loss or a non-capital loss and thus cannot be applied against income in the year the expenses were incurred, and cannot be carried back to be applied against income of the preceding year or forward to be applied against income of any subsequent year. If capital assets are acquired for a business before the business commenced, are later used in the business and are not used for some other purpose in the meantime, the capital cost of the assets is the amount that it would have been had the business been operating when the assets were acquired. If the business for which

the capital assets were acquired never commences, the normal rules in the Act regarding capital gains and capital losses would apply if and when the assets were subsequently disposed of.

Expenditures After the Commencement of a Business

7. After a business has commenced, all expenditures that are recognized for purposes of the *Income Tax Act* and that were made in respect of the business are to be classified in the usual way as being expenses incurred for the purpose of earning income or as outlays on account of capital. Expenses incurred for the purpose of earning income normally are deductible in the year when incurred even if, after all the efforts made, the business has to be wound up before its normal operation ever does begin. Fees or other costs incurred in connection with the proposed acquisition of capital assets, which would normally be added to the cost of the assets when acquired, are to be classed as eligible capital expenditures if the assets are not in fact acquired, perhaps because of an abandonment of the business. In regard to representation expenses and interest on money borrowed to acquire depreciable property, see comments in Interpretation Bulletins IT-99 and IT-121R, respectively.

More Than One Business

8. Any taxpayer, whether a corporation or an individual, may occasionally be carrying on business activities that consist of two or more separate businesses (see Interpretation Bulletin IT-206). Where such is the case, each business must be considered separately where it is necessary to determine the date of commencement of one of the businesses.

¶ 52,370 [Interpretation Bulletin No. IT-365R] Damages, settlements and similar receipts

[Interpretation Bulletin No. IT-365R dated March 9, 1981, issued by the Department of National Revenue, Taxation, replaces and cancels Interpretation Bulletin No. IT-365 dated March 21, 1977. This Bulletin examines the tax status of damages, settlements and similar receipts in the nature of compensation. CCH.]

Reference: Section 3 (also sections 5, 6 and 56, and paragraphs 81(1)(g.1) to (g.3)).

1. The purpose of this bulletin is to discuss the tax status of termination payments, damages for personal injury, compensation for loss of property or income, and settlements and similar receipts.

Recognized that the question of whether or not a taxpayer is in receipt of taxable income can be determined only by an examination of all the facts pertinent to the particular situation; however, the criteria in

the following paragraphs are applicable in making this determination in arm's length situations.

Receipts in Respect of Termination of Employment

2. An amount that a taxpayer receives in respect of a termination of employment by his employer under the expressed or implied terms of an employment contract is to be included in computing the taxpayer's income from an office or employment, normally under section 5, 6 or paragraph 56(1)(a) (other than subparagraph 56(1)(a)(viii)). As a rule, these taxable amounts include payments of salaries, wages, compensation for accrued vacation or sick leave credits, retiring allowances, payments in lieu of earnings for the period of a reasonable notice, or any other payments made by virtue of the terms of his employment (explicit or implied). However, if any payment received in respect of a termination of employment is not required to be included in income under any other provision of the Act such a payment will, if received in respect of a termination after November 16, 1978, be included in computing income under subparagraph 56(1)(a)(viii) to the extent it represents a "termination payment" as described in 3 and 4 below.

3. "Termination payment" for a taxation year, as defined by subsection 248(1), is the lesser of

- (a) the aggregate of all amounts received in the year in respect of a termination of an office or employment, whether received pursuant to a judgment of a competent tribunal or otherwise, other than
 - (i) an amount required by any provision of the Act (excluding subparagraph 56(1)(a)(viii)) to be included in computing the income of a taxpayer for a year,
 - (ii) an amount in respect of which an election has been made under ITAR 40(1), and
 - (iii) an amount received as a consequence of the death of an employee, and
- (b) the amount by which 50% of the taxpayer's total remuneration from the office or employment for the 12 months period preceding the date of the ter-

mination or the date of an agreement in respect of the termination, whichever is the earlier, exceeds the amount (if any) included under (a) above, in the determination of a "termination payment" for each previous year in respect of the same termination of employment.

4. The Act does not define what constitutes "an amount received in respect of a termination of an office or employment". The Department will consider any amount that is received in consequence of a termination of employment (other than an amount included in income under another provision of the law or the exceptions listed in 3(a)(ii) or (iii) above) to be an amount received in respect of a termination of an employment. Examples of payments that may sometimes qualify as a termination payment are a payment as damages for a breach of an employment contract or for loss of future job opportunity, a payment as damages for failure to give reasonable or adequate notice of termination or an amount paid in respect of a wrongful dismissal or loss of reputation, provided it is not included in income under another provision of the law as in 2 above. The following characteristics should be present in order that a payment not be included in income under another provision of the law:

- (a) The employee must have been dismissed without cause (or with insufficient cause) and/or without due notice.
- (b) The employer must not have agreed voluntarily at any time to compensate the employee.
- (c) There must have been a breach of the employment contract or terms of employment (some contracts may allow dismissal at any time).
- (d) Subject to subparagraph (f) below, there must have been litigation wherein the court found that there had been a breach of the employment contract from which damages flowed.
- (e) The settlement awarded by the court must be damages and not salary for the period for which the notice should have been given.
- (f) Where the case is settled out of court there must be clear evidence that the employer was prepared to breach the employment contract but settled to

avoid a court case by paying a lump sum. To the extent that the settlement cannot be identified as being X month's salary it may be treated as damages.

Where the employee has an employment contract which specifies what he is to be paid in the event of termination, any payment received by the employee up to the amount specified is income under the employment contract and therefore taxable. It is a question of fact whether any additional money received is something that arose under the contract or is in the nature of damages. Where the employer accepts his obligation to give the employee money in lieu of notice but there is an argument about the amount, the final settlement is considered to be made under the employment contract and is totally taxable.

Receipts in Respect of Personal Injuries

Amounts in respect of personal injuries or death may be received in respect of all of the following:

(a) Special damages—examples are compensation for

- (i) out-of-pocket expenses such as medical and hospital expenses, and
- (ii) accrued or future loss of earnings;

(b) General damages—examples are compensation for

- (i) pain and suffering;
- (ii) the loss of enjoyment of life;
- (iii) the loss of earning capacity; and
- (iv) the shortening of expectation of life.

(c) Amounts as compensation for loss of support may be paid to the dependents of the deceased.

All amounts in (a), (b) and (c) above will be treated as non-taxable receipts provided that they can reasonably be considered as compensation in respect of personal injuries and not income from employment or a termination payment. (See 11-202R Workmen's Compensation Payments; Injury Leave Pay or Similar Payments.) An amount of such a compensation is non-taxable even though the quantum of the compensation is determined with reference to accrued loss of earnings to the date of award or settlement or to future loss of earnings.

6. The method of payment (periodic or lump sum) is not an important factor in determining the taxability of an award or settlement for personal injuries or death. However, where an amount that has been determined to be non-taxable is paid on a periodic basis, see 13 below for taxing of interest element, if any.

Receipts in Respect of Non-Performance of Business Contracts

7. An amount received by a taxpayer in lieu of the performance of the terms of a business contract by the other party to that contract may, depending on the facts, be either an income or capital receipt. If the receipt relates to the loss of an income-producing asset, it will be considered to be a capital receipt; on the other hand, if it is compensation for the loss of income, it will constitute business income. Again, while it is a question of fact as to whether a receipt is an income or capital amount, the following factors are important in making this distinction:

(a) if the compensation is received for the failure to receive a sum of money that would have been an income item if it had been received, the compensation will likely be an income receipt.

(b) "where for example, the structure of the recipient's business is so fashioned as to absorb the shock as one of the normal incidents to be looked for and where it appears that the compensation received is no more than a surrogatum for the future profits surrendered, the compensation received is in use to be treated as a revenue receipt and not a capital receipt", and

(c) "when the rights and advantages surrendered on cancellation are such as to destroy or materially cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organization and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation represents the price paid for the loss or sterilization of a capital asset and is therefore a capital and not a revenue receipt." (The wording in (b) and (c) above represents quotations from the judge-

ment in *Commissioner of Inland Revenue v. Fleming and Co. (Machinery) Ltd.*, 33TC57 (House of Lords.)

8. Where an amount received by a taxpayer in compensation for a breach of a business contract is a capital amount according to the comments in 7 above, that amount would relate either to a particular asset of the taxpayer or to the whole structure of his profit-making apparatus. If, on the basis of the facts of the case, such as the terms of a contract, settlement or judgment, the amount received relates to a particular asset (tangible or intangible) which is sold, destroyed or abandoned as a consequence of the breach of contract, it will be considered proceeds of disposition of that asset or a part thereof, as the case may be. Where the amount of compensation relates to a particular asset that was not disposed of, the amount will serve to reduce the cost of that asset to the taxpayer. On the other hand, where the amount of compensation is of a capital nature but it does not relate to a particular asset as indicated above, the amount will be considered as compensation for the destruction of, or as damages to, the whole profit-making apparatus of the taxpayer's business. Such compensation may result in an "eligible capital amount" for the purpose of subsection 14(1) and subparagraph 14(5)(a)(iv).

9. A number of provinces make crime-compensation awards pursuant to the authority of criminal-injury compensation acts. The Department considers that such crime-compensation awards are non-taxable.

10. A taxpayer who is a victim of a crime may receive compensation from a source other than the person who committed the crime or a crime compensation board. For example, a taxpayer who is an employee of a bank is kidnapped and upon his release the bank pays the employee an amount to compensate for "damages" inflicted on him. Where the amount of money or benefit received is compensation for damages the Department will normally consider the amount to be a non-taxable receipt even if the damages are computed with reference to the victim's salary. To qualify as a non-taxable receipt, the amount must not be in excess of a fair evaluation of the damages suffered by the employee having regard to all relevant facts of the case. The amount of the receipt will ordi-

narily be accepted as a fair evaluation unless there are indications (such as the employer and employee not dealing at arm's length) that the receipt includes an amount for services rendered by the employee to the employer. Any part of an amount received by a taxpayer from his employer, or former employer, that is compensation for loss of earnings (e.g. an amount paid in lieu of regular wages or benefits) resulting from a disability of short duration will be included in the income of the taxpayer.

11. Where a taxpayer, other than an employee, is in receipt of an amount that has not been awarded by a court or a crime-compensation board (a payment by a bank to a customer, for example) for "damages" inflicted on him as a result of a crime, the total amount is considered to be a non-taxable receipt.

Compensation for Loss of Business Income or Business Properties

12. Amounts received by a taxpayer with respect to the loss of business income or business property may fall into one of the following categories:

- (a) a non-taxable receipt,
- (b) an income receipt,
- (c) a receipt resulting from the disposition of a capital property, or
- (d) an eligible capital amount.

See IT-182 for a discussion of the factors that determine the tax status of a given receipt.

Interest Element in Awards for Personal Damages

13. Where payments for damages that have been awarded by a Court or resolved in an out-of-court settlement, in respect of personal injuries or death, are paid on a periodic basis, the payments will not be considered to be annuity payments for the purposes of paragraphs 56(1)(d) and 60(a). Accordingly, no part of such payments will be treated as interest income. However, where an award for damages has been used by the taxpayer or his representative to purchase an annuity, the amounts received will be considered as annuity payments under paragraphs 56(1)(d) and 60(a) and Regulation 300. A bulletin on the subject of annuities is presently being prepared for publication and will comment on annuity

payments in greater detail. Where awards for damages are held on deposit, the amount of interest earned will usually be determined and included in the taxpayer's income annually. Where an award for damages is held in trust, any interest earned on the funds that is retained by the trust is income of the trust or of the beneficiary depending on the circumstances.

14. Under paragraph 81(1)(g.1) any income or taxable capital gain received before a taxpayer attains the age of 21 years is excluded from income to the extent it represents income from property or taxable capital gains from disposition of property that was acquired as damages in respect of physical or mental injury or that is property substituted for property so acquired. Paragraph 81(1)(g.2) applies to extend this exclusion to income received

before the taxpayer attains the age of 21 years that represents income on the income or taxable capital gains excluded under paragraph 81(1)(g.1). Paragraph 81(1)(g.3) excludes from income interest paid in respect of a period during which the taxpayer was under 21 years of age where it represents interest paid by certain third parties on property or income from property referred to above which has been held by such parties on behalf of the taxpayer.

15. Where a periodic payment is determined to include an interest element which is included in the taxpayer's income pursuant to the provisions of paragraphs 56(1)(d) and 60(a), the amount of interest may be deducted in arriving at the taxpayer's taxable income pursuant to the provisions of section 110.1.

¶ 52,371 [Interpretation Bulletin No. IT-366] Principal residence—
Transfer to spouse or spouse trust.

[Interpretation Bulletin No. IT-366 dated March 28, 1977, issued by the Department of National Revenue, Taxation, discusses the principal residence exemption in respect of property transferred to a taxpayer's spouse or a spouse trust. CCH.]

Reference: Subsection 40(4) (also subsection 40(5) and paragraph 54(g)).

1. This bulletin outlines the effect of subsection 40(4) on the computation of the principal residence exemption under paragraph 40(2)(b) or (c) where a taxpayer's spouse (or former spouse) or a spouse trust disposes of property which was acquired from the taxpayer under the conditions described in 2 below. In the bulletin the "taxpayer" is assumed to be the husband, but, of course, the same comments would apply if the taxpayer was the wife. Interpretation Bulletin IT-120R, "Principal Residence", discusses other matters concerning the principal residence exemption.

2. The provisions of subsection 40(4) may apply only where the rollover provisions in subsection 70(6), in the case of a transfer on death, or those in subsection 73(1), in the case of an *inter vivos* transfer, applied to the transfer of the taxpayer's property to his spouse or a spouse trust.

3. In accordance with subsection 40(4), for the purpose of computing the gain under paragraph 40(2)(b) or (c) on the subsequent disposition of the property by the spouse (or former spouse) or spouse trust, the property is deemed

- (a) to have been owned by the spouse or trust for the period during which it was owned by the taxpayer, and
- (b) to have been the principal residence of the spouse or trust for any year in the period in (a) above if the taxpayer, in respect of the year,
 - (i) has designated it to be his principal residence, in the case of an *inter vivos* transfer to the spouse or trust, or
 - (ii) was eligible to designate it to be his principal residence, in the case of a transfer on death, to the spouse or trust.

4. Pursuant to the provisions described in 3 above, the years of ownership by the taxpayer are included in the denominator of the fraction illustrated in 12 of IT-120R when computing the exemption under paragraph 40(2)(b) or subparagraph 40(2)(c)(i) on the disposition of the property by the spouse or spouse trust. Also, the numerator of that fraction (or where subparagraph 40(2)(c)(ii) applies, the number of years for which the spouse or trust is entitled to the \$1,000 per year exemption) includes each year of ownership by the taxpayer for

NDP campaign manager Gayle Cromwell said her party is also ready for the campaign, expected to be called Friday or Saturday for Nov. 6, and hopes to win more ridings than the one it now holds.

even nominated.

Miss Robertson said party workers are rested after the federal election and are prepared to hit the campaign trail again this fall.

Ms. McDonough said campaigning across the province for the Halifax Chebucto seat — the non-Conservative seat in m...

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THE CHRONICLE

VOLUME 36, NO. 230

HALIFAX, CANADA, THURSDAY, SEPTEMBER 11, 1980

'Nightmare' for Marshall over

By ALAN JEFFERS
 Provincial Reporter

Provincial government compensation of \$270,000 will not pay Donald Marshall Jr. for the "nightmare of the last 13 years," his lawyer said Wednesday.

Mr. Marshall has been under strain that has been "incalculable and

at times intolerable," Felix Cacchione told a press conference in Halifax.

The Nova Scotia Micmac, who received national attention after spending 11 years in prison on a wrongful conviction of murder, was awarded the compensation as an acknowledgement by the province that an

innocent man was mistakenly imprisoned, he said.

Mr. Marshall will be left with about \$170,000 after paying legal bills of \$100,000, he said. Another \$45,000 was raised by a Montreal minister and will go to Mr. Marshall.

"You could have given this man \$10 billion and that would not have been enough to make up for the outrage and the injustice he's had to live through," Mr. Cacchione said.

Mr. Marshall did not attend the press conference, seeking instead to "retire from public view."

"The situation that Donald wishes to avoid is walking out his front door every morning with a camera crew standing there."

He wants to "get on with living the private life which was denied him for so long," he said. "It is with a view to putting behind him the nightmare of the last 13 years that Donald has chosen to accept the offer of compensation."

Mr. Marshall is "relieved" the matter has finally come to an end, Mr. Cacchione said, relating how he and Mr. Marshall drafted a prepared statement Tuesday night which was read to reporters.

The compensation agreement, completed about two weeks ago, comes as a result of negotiations between the province and Mr. Cacchione.

The agreement was then approved by Prince Edward Island Supreme Court Justice Alex Campbell who, in March, was appointed by the provincial government as a one-man commission of inquiry to determine only the amount of compensation to be awarded and not to probe into events surrounding the conviction.

See NIGHTMARE page 2

Lawyer says inquiry needed

By ALAN JEFFERS
 Provincial Reporter

Nova Scotians and Canadians "must demand an inquiry into why it occurred in the first place."

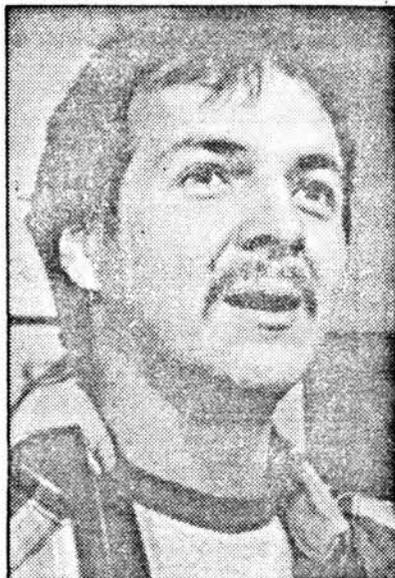
That's the feeling of Donald Marshall Jr., through his lawyer, Felix Cacchione.

"The case of Donald Marshall Jr. shows us very clearly how long it can take to correct a mistake made in the criminal justice system," he told a press conference in Halifax Wednesday.

It's up to the citizens of Nova Scotia and Canada to decide "whether there should be an accounting to them for the failure of our system of justice."

While Mr. Cacchione said he thinks government is obligated to investigate the events surrounding that night in 1971 in Sydney's Wentworth Park, the provincial government has not been so clear in its thinking.

Attorney-General Ron Giffin has not been available to answer ques-



Donald Marshall Jr.

tions about the province's position on an inquiry into the breakdown of the justice system.

A press conference scheduled to

See LAWYER page 2



Queen Elizabeth and Prince Philip at a landau Wednesday in Ottawa.

Queen 'exasperated'

By JIM MEEK
 and The Canadian Press

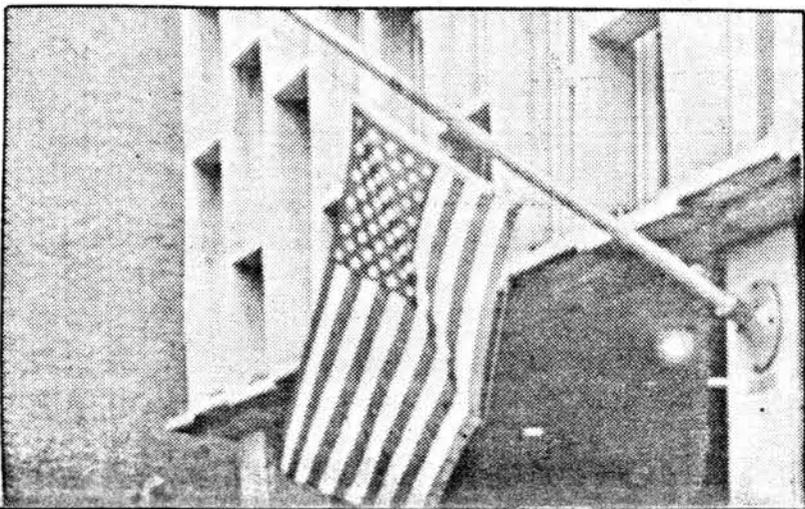
OTTAWA — Queen Elizabeth II told Canadians Wednesday that her visit to the capital represents "hope" for a troubled world.

In a brief address to a group of people, the Queen said Canada provided "an example for the world in overcoming the obstacles to nationhood, while at the same time preserving the essentials to freedom possible."

"Preeminently among the nations, Canada represents the future."

On the coldest day of the autumn, the Queen said Canada shown a "unique" ability to overcome internal differences, and to solve the communication and transportation problems posed by the country.

She said Canadian democracy has been a bold



Today

Winning numbers

Ticket number 339489 was the unofficial winner of the \$800,000 jackpot in the Atlantic Lottery Corp.'s A-Plus draw held Wednesday. Ticket number 995645 was the unofficial winner of the \$100,000 grand prize. Prizes of \$25,000 each went to ticket numbers 809421, 860165, 768423 and 483147. Prizes of \$5 each went to tickets

Nightmare

(Continued from page 1)

But because of the limited scope of the inquiry, negotiations were agreed to be a quicker and cheaper way to proceed.

It was 13 years ago that Mr. Marshall was convicted of murdering his companion Sandy Seale in a Sydney park. An RCMP investigation in 1981 turned up new evidence in the case, and as a result Mr. Marshall was paroled the next year. He was acquitted of murder last year by the appeals division of the Nova Scotia Supreme Court.

Another man, Roy Ebsary, was convicted of manslaughter in Seale's death but recently won a new trial on the grounds that the judge misdirected the jury on the law of self-defence. It has not yet been decided whether the attorney-general's department will order a new trial for the 72-year-old Ebsary, whose health is failing.

Mr. Cacchione said that as a condition for compensation, Mr. Marshall agreed not to take any court action against the province of Nova Scotia.

But he does maintain the right to sue the City of Sydney, the Sydney police department and the two policemen who were responsible for his wrongful conviction, Mr. Cacchione said.

"The matter of pursuing the matter further is up to Donald and judging from Donald's comments ... he would like the matter to end at this point."

The compensation money will not be the only funds Mr. Marshall receives for his 11 years in prison.

Mr. Marshall, his original lawyer Stephen Aronson, and Globe and Mail reporter Michael Harris are the principles in a company established to control the book and movie rights of the Marshall story.

Lawyer says

(Continued from page 1)

announce the Marshall compensation was cancelled and in its place a three-paragraph statement was sent over the government's news wire.

And Mr. Giffin could not be reached at his office by telephone after the announcement was released. His secretary said he would not be in until Tuesday.

When the Marshall issue came up during the last session of the legislature, the Conservatives took the political pressure off by appointing Prince Edward Island Supreme Court Justice Alex Campbell to examine how much compensation should be awarded Mr. Marshall, but not the events surrounding his wrongful conviction.

"Without the public pressure brought to bear by the committee of concerned citizens, the fund-raising efforts of Rev. (Bob) Hussey of Montreal and by those individual citizens who wrote to their newspapers, their MPs and their MLAs, we must wonder whether or not a commission would have been established to inquire into the question of compensation for Donald Marshall Jr.," Mr. Cacchione said.

Mr. Justice Campbell was "instrumental" in bringing the government to the bargaining table.

Before the former P.E.I. premier was appointed "a certain impasse was reached whereby the government wouldn't talk to us."

German SS unwittingly

MIAMI BEACH, Fla. (AP) — The mayor of this heavily Jewish city says he wants back the medal he unwittingly presented to a former sergeant in the German SS who once worked in a concentration camp.

The gold city medallion was presented Friday to Franz Hausberger, mayor of a ski village in the Austrian Alps, as part of a tourism promotion. Miami Beach Mayor Malcolm Fromberg did not know at the time Hausberger, 64, was part of the First SS Infantry Brigade during the Second World War.

"I will write him and ask for it back," Fromberg said. "He took it under false pretenses."

The mayor also said he had composed a plan to prevent such "embarrassing" events from happening again

Monitoring program introduced

WATERLOO, Ont. (CP) — Group home residents may become part of a provincial government program used by inmates to alert authorities about problems in prisons and mental institutions, says Ontario's community and social services minister.

"We have to find a vehicle whereby a child will know that if something is untoward, he will have a remedy," Frank Drea said in an interview Wednesday.

The minister's comments follow an incident Sunday in which a group home operator in Sunderland, Ont., about 70 kilometres northeast of Toronto, was charged with sexually assaulting two former residents of the home. Residents have been removed and the home closed pending outcome of the case.

Drea said he is considering including group home residents in the distress signal program, which provides special envelopes for mailing complaints to the ministry. Home operators would be required to mail the sealed envelopes immediately or risk losing their licences, he said.

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Sept 20/04
09-84-0256-01

ON BUSINESS NEP, FIRA face major overhaul

Saying that Canada must be seen as a good place to invest, International Trade Minister James Kelleher says the national energy program and FIRA will be changed. /B1

Quote of the day

"We'd be ordering ink by the truckload." — Keith McCormick, a New Brunswick prosecutor, offers an explanation for poor identification of the multitude of people accused of drinking and driving offences. /12

Old labels lose meaning

Recent Government reforms instituted by the French President Francois Mitterrand's Socialists show that the party is bursting out of its old ideological seams. /11

Ontario PCs embarrassed

The Ontario Government is scrambling to fix an embarrassing mistake. It named a Catholic school trustee to a commission studying its policy of financing Catholic high schools. /12

Review planned in census case

Justice Minister John Crosbie says he will review the case of a Vancouver-area woman whose acquittal in refusing to answer census questions goes to appeal today. /5

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The normally quiet capital city of 40,000 turned out in full force to greet the Royal couple for their one-day visit.

A crowd estimated at 20,000 attended their afternoon "walkabout" at a children's picnic marking the province's bicentennial in a downtown park. Dozens of buses brought the children from throughout the province.

Some, like Jennifer Phillips of Fredericton, waited five hours to

N.S. awards \$270,000 to Marshall

By MICHAEL HARRIS
Globe and Mail Reporter

HALIFAX — Donald Marshall Jr., who spent 11 years in prison for a murder he did not commit, has been awarded \$270,000 by the province of Nova Scotia for his wrongful imprisonment.

In return, Mr. Marshall has agreed to waive any further legal action against the Crown for his ordeal.

The *ex gratia* payment, confirmed yesterday by Mr. Marshall's lawyer, Felix Cacchione of Halifax, will be made this week and will bring to an end Mr. Marshall's 2½-year struggle to clear his name.

"I had to do it," Mr. Marshall said in an interview. "There's a lot about this thing I don't like, but to go on fighting would mean more legal bills and more time in court. I've had enough court."

The Micmac Indian was 17 when he was convicted of the 1971 murder of a 17-year-old black youth, Sandy Seale, in Sydney, N.S. — a crime Mr. Marshall repeatedly denied

MARSHALL — Page 4

Earlier in the day, the Queen, wearing a rose-pink coat, white silk hat and pink and white print dress, sat in a gazebo in Wilmot Park with her husband, as they listened to two choirs and the New Brunswick Youth Orchestra. A group of girls performed a gymnastics routine using a rainbow-colored parachute and a group of teen-age boys demonstrated break-dancing.

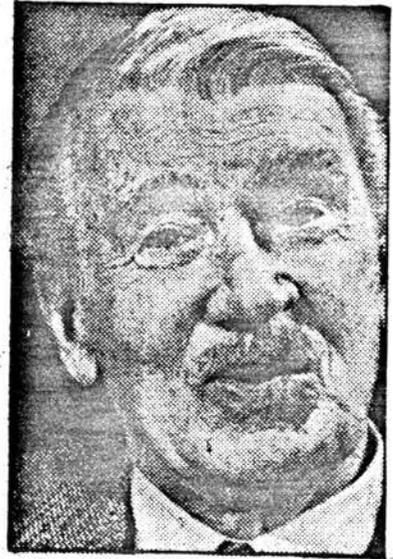
The picnic came at the end of a long, hot day of official events.

The Royal couple began by flying from Moncton to attend an hour-long church service at Christ Church Cathedral, where the Queen and the Duke signed a Bible first presented to the city by Edward, Prince of Wales, in 1860.

Their names were added to the bottom of a page that included the faded signatures of King George VI and Queen Elizabeth, who signed it in 1939, and those of Princesses Marina, Alexandra and Margaret.

Prince Philip read the second lesson, Matthew 13:14-23, a New Testament passage that contains

THOUSANDS — Page 2



Walter Pidgeon
The New Brunswick-born veteran actor died yesterday in California at 86.

Hopes poor for jobless as times improve, OEC

By PETER COOK

Canada's unemployment rate, now 11.2 per cent, will not move lower, despite continuing growth in the economy, and will average 11 per cent for the rest of this year and through 1985, according to the Organization for Economic Co-

The Organization also focuses on the plight of young people who form a disproportionately large segment of the unemployed now, compared with the years before the 1981-82 recession.

In the case of Canada, the fore-

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By JEL Globe

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He disco the Torie Liberal I Trudeau's

Lingerl

current ran and only a be expecter

people in Edmonton leave their snowshoes behind and come to the jewel of the West—Nanaimo.”

A total of 102 Vancouver Island residents took the low-fare charter flight from Comox to the 450-store West Edmonton Mall for the huge shopping spree.

Alexis Hamilton, one of the eager shoppers attracted by the \$139.99 return-trip air fare, estimates she

well.
“I think we've got a good thing going here,” she said.

The invasion by the long-distance shoppers was good for business, said mall president Nader Ghermazian. He estimated the average shopper spent \$345 on Saturday alone.

“They came, spent money, and had the absolute time of their lives,” he said.

Marshall awarded low, lawyer says

● From Page One

committing during his years in prison.

In 1981, new evidence in the precedent-setting case was uncovered by Mr. Marshall and his original lawyer, Stephen Aronson, which led to a new RCMP investigation.

The new investigation resulted in Mr. Marshall's release from Dorchester Penitentiary on March 29, 1982, and his subsequent acquittal on May 10, 1983.

Shortly after that decision was announced, 72-year-old Roy Ebsary, a former vegetable cutter at a Sydney hotel, was charged with the murder of Mr. Seale.

Last November, Mr. Ebsary was convicted of manslaughter in the stabbing death of Mr. Seale, but that conviction was subsequently overturned by the Nova Scotia Supreme Court Appeals division on the grounds that the presiding judge misdirected the jury on the law of self-defence.

Nova Scotia Attorney-General Ronald Giffin is currently considering whether to order a new trial for Mr. Ebsary.

Mr. Cacchione, who has represented

Mr. Marshall since the Nova Scotia Supreme Court acquitted him in 1983, said the award was “definitely in the low range,” but that he had to consider his client's wishes and his general state of mind. Mr. Cacchione said he has an attorney's report that shows Mr. Marshall's jail term cost him more than \$330,000 in lost wages alone.

“Donald made very clear to me that he wanted this thing settled by the end of summer and that's what we've done. Apart from his personal wishes in the matter, one of my greatest concerns was his general state of mind. I don't think it bears saying that, after 11 years in prison and 2 years in the public eye since his release, that this man has been under incredible amounts of pressure. It's time to begin a new life.”

Tomorrow, Mr. Marshall will receive a cheque for \$245,000. Earlier this year, he was given a \$25,000 interim payment that the Government considered as part of his over-all compensation of \$270,000.

Mr. Marshall will have to pay the legal costs incurred in proving his innocence, and Mr. Cacchione says that his client will be left with approximately \$173,000 after the bills are paid.

six-month investigation of Hydro's accounts. However, the Liberals and New Democrats insisted yesterday that the auditor's probe was crippled by a Conservative amendment that restricted access to information.

Mr. Wildman said the auditor's inquiries “were far too limited to shed any light,” while Liberal researcher Gary Gallon added: “We submitted 100 questions, and we were really angry that 20 per cent . . . were rejected by the auditor.”

Ferguson Jenkins, the former Chicago Cubs baseball star, will switch to a new game this fall — politics.

Mr. Jenkins, a pitcher who won 284 games during a 19-year career in the major leagues, said yesterday he will seek the Liberal nomination for the provincial riding of Windsor—River-side.

Born in Chatham, Ont., Mr. Jenkins now makes his home in the nearby farming community of Blenheim in the riding of Kent—Elgin. Liberal James McGuigan holds Kent—Elgin and former MP Maurice Bossy is expected to win the Liberal nomination for Chatham—Kent, held by Conservative Andrew Watson.

Mr. Jenkins said officials in Liberal Leader David Peterson's office looked at a number of ridings for him to run in and decided that Windsor—Riverside, held since 1977 by New Democrat David Cooke, was the best bet.

Doctors can't predict outcome

Smallwood resting after

By PAT ROCHE

Special to The Globe and Mail
ST. JOHN'S — Former Newfoundland Premier Joey Smallwood was resting comfortably in hospital yesterday after a stroke that left him unable to speak, according to his doctors.

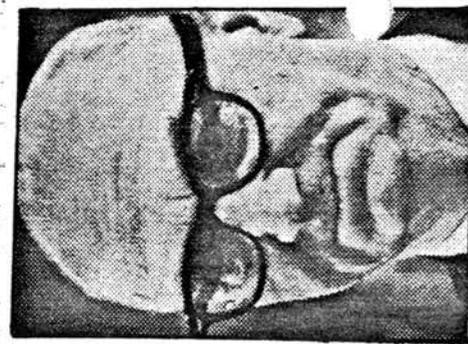
“It's much too early to make any prediction of his eventual outcome or degree of recovery,” neurologist Dr. Mark Sadler told a press conference yesterday.

Mr. Smallwood, 83, was taken to hospital Monday after he became ill at the St. John's offices of his publishing company.

The former premier was experiencing “weakness” in his right arm and the right side of his face but was fully alert, Dr. Sadler said.

The extent of his stay in hospital “depends to a good deal on his progress (and) his response to therapy . . . but after a cerebrovascular accident like this one, one has to measure hospitalization in terms of weeks,” said neurologist Dr. William Pryse-Phillips, who also examined Mr. Smallwood.

Since his retirement from



Joey Smallwood

Newfoundland. The second volume of what is intended to be a seven-volume work was published in July.

As was his practice, Mr. Smallwood had been working long hours and had not taken a vacation. He showed no previous signs of ill health, however, apart from a mild degree of high blood pressure, according to a granddaughter, Dale Fitzpatrick.

Mrs. Fitzpatrick, who is also manager of Mr. Smallwood's

November 18, 1983

The Honourable Ronald C. Giffin, Q.C.
Attorney General & Provincial Secretary,
Government of Nova Scotia,
Provincial Building,
P.O. Box 7,
Halifax, Nova Scotia.
B3J 2L6

RECEIVED
NOV 22 1983

ATTORNEY GENERAL

Dear Mr. Giffin:

When will justice finally be done in your jurisdiction regarding the case of Donald Marshall, who spent 11 years of a life sentence in prison for a crime he did not commit?

If Marshall had not been a Canadian Indian, would he have been convicted in the first place? Probably not.

If Marshall was not a Canadian Indian, would he be stuck with an \$82,000 legal bill defending his innocence? I think not.

It seems the infectious bigotry of the Maritimes' dear old Senator Richard Donahoe has poisoned even the justice system of Nova Scotia.

The old saying "justice delayed is justice denied" couldn't be more true. First the Indian is arrested; the Indian is sentenced; the Indian spends 11 years behind bars; the Indian is proven innocent; and finally the Indian is expected to pay \$82,000 for this monstrous injustice. I don't know how the Crown involved in the prosecution (it should be persecution) can sleep at night, even after 11 years. If the legal people of Nova Scotia who managed this despicable conviction were really interested in justice, they would now quickly see that Marshall's legal bills are paid, arrange some compensation for the 11 innocent years of incarceration, and allow this Canadian Indian, who has enjoyed Nova Scotian "justice" for 11 years, to get on with rebuilding his life.

I happen to be a Canadian Indian who is sick and tired of seeing Indians across this country being harassed and persecuted by the bigotted "meat head" mentality so prevalent with police; the judiciary and three levels of government. I also believe that had Marshall been a visible minority immigrant rather than Canadian Indian, he would not have suffered this savage injustice which has angered every fair minded Canadian, Indian and non-Indian. Each of us is forced to wonder how we could elect and support a system which allows such callous representation and action.

Attached are clippings from just one day in Toronto's newspapers, along with a Globe and Mail editorial. One day the state and its representatives will answer for the ongoing crimes against humanity perpetrated on Canadian Indians since the Europeans brought their peculiar civilization to this country. I am certain, however, Indians and other citizens would settle for the brand and quality of justice, which might be meted out to any white middleclass politician from the party in power in any province, even Nova Scotia.

Your comments please or, better still, some action to right this wrong.



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copy to: The Honourable Richard Hatfield
The Right Honourable Pierre E. Trudeau
The Honourable Brian Mulroney
The Honourable John C. Munro
The Honourable Mark MacGuigan
Senator Richard Donahoe
The Honourable George W. Taylor
The Honourable R. R. McMurtry
Mr. John McDermid, M.P.
The Honourable David Collenette
The Honourable John Roberts
The Honourable Nicholas G. Leluk

Letters to the Editor, The Chronicle-Herald
The Mail-Star

Letters to the Editor, Cape Breton Post

Ottawa has sympathy for Marshall but no aid

By CHARLOTTE MONTGOMERY
Globe and Mail Reporter

OTTAWA — One federal Cabinet minister says he is "moved" by the legal debts saddling a Nova Scotia man who spent 11 years in jail for a murder he didn't commit. Another admits he is "troubled" by the case. But neither is prepared to offer financial assistance.

For the Government to pay the \$82,000 that Donald Marshall owes his lawyer for managing his legal route from prison to freedom would simply not be "very good federalism," Justice Minister Mark MacGuigan told the House of Commons yesterday.

In 1971, Mr. Marshall, then 17, was sentenced to life in prison for the murder of a teen-ager in a Sydney, N.S., park. This month, a Nova Scotia jury found a 71-year-old man guilty of manslaughter in that slaying.

The process of vindication began in June, 1982, when Jean Chretien, then federal justice minister, granted a new hearing to Mr. Marshall. After the hearing in December, 1982, at which two witnesses admitted lying at the original trial because of police pressure and a new witness came forward to support him, he was acquitted.

Mr. Marshall now works as a plumber on an Indian reserve near Halifax. His lawyer plans to meet the provincial Attorney-General to discuss compensation for the years he was in jail.

Yesterday, NDP Indian affairs critic James Manly raised the issue of compensation in the Commons.

He said Indian Affairs Minister John Munro had reportedly promised to "do his damndest" to get Mr. Marshall compensation for his legal costs and asked whether there is a source of federal money "to help pay for the tragedy that this young man has suffered, at least to cover his legal costs."

First, Mr. Munro noted that the statement cited by Mr. Manly refers to a quote "of somebody else."

He went on to say that he had talked to Mr. Marshall's father, had met his lawyer on several occasions and had heard representations of "a very moving nature" about the legal costs and other losses Mr. Marshall had suffered because of this "atrocious occurrence."

"There is absolutely no authority in my department for payment. . . . I did write to the province on at least two occasions urging it to look with compassion on the situation. As well, I examined other areas in Government that might provide funding. There is none. I regard this very much as an obligation on the part of the provincial Government."

Mr. Munro said his department arranged a job for Mr. Marshall to "alleviate some of the hardship" when he got out of jail.

Allan Lawrence, Conservative justice critic, put the same question about compensation to Mr. MacGuigan.

But Mr. MacGuigan said that because he is "troubled" by the situation, he plans to discuss it with Nova Scotia's Attorney-General.

★ TORONTO STAR, WEDNESDAY, NOVEMBER 16, 1983



Not good federalism to pay Marshall fees MacGuigan claims

By Bruce Ward Toronto Star

OTTAWA — "It would not be very good federalism" for Ottawa to pay the \$82,000 in legal fees Donald Marshall built up trying to prove he was innocent of murder, Justice Minister Mark MacGuigan says.

Ottawa cannot pay Marshall's legal bills because the matter falls under provincial jurisdiction, MacGuigan told the House of Commons yesterday.

But Marshall has Ottawa's sympathy, MacGuigan said.

Marshall, a Micmac Indian, spent nearly 11 years in prison for the murder of a Cape Breton youth in Sydney, N.S., in 1971. A court declared Marshall innocent last May and released him.

Roy Ebsary, 72, has since been convicted of manslaughter in the case and will be sentenced on Nov. 24.

There "is no precedent for payment," MacGuigan said, adding Marshall's wrongful conviction was the fault of the Nova Scotia government. Ottawa is pressing the province to pick up the legal fees, he said.

But the provincial attorney-general's department has said Nova Scotia bears no legal responsibility or moral obligation to pay the legal bills.

MacGuigan came under fire from Conservative justice critic Allan Lawrence, who said the minister was splitting hairs.

The fact that Marshall is a status Indian gives the federal government a stake in his case, Lawrence said. Also, Lawrence argued, Marshall won a new trial because of intervention by the Royal Canadian Mounted Police.

But MacGuigan called such arguments "astonishing" and said they were without merit.

MacGuigan also argued that Indian Affairs Minister John Munro has never committed Ottawa to paying Marshall's legal costs, as had been claimed earlier.

We must find a way to bring Indians dignity



Barney Danson: Former federal Indian affairs minister says problem can be solved, even with some failures.

Richard Gwyn's article, (Nov. 8) zeroed in on what the heading (Our greatest failure is in dealing with Indians) rightly identified as our greatest failure, but blame cannot be easily assigned.

When I was in government, I seized every opportunity to work closely with native people on developing programs that would bring them dignity and self-reliance. Native people responded, but sometimes initial success proved sadly temporary. On leaving government, I was left with a gnawing conviction we must find a better way.

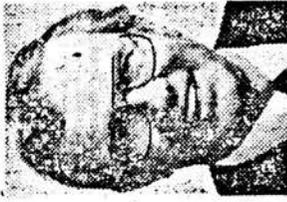
The recommendation (of the Commons special committee on Indian affairs) for optional self-government is attractively simple, perhaps deceptively so, but it does have some sensible safeguards. I have never met a native person who did not recognize the complexity of the situa-

tion, but they were virtually without hope of achieving solution or even real progress.

It is highly unlikely they would give up existing benefits unless they were reasonably certain they could elect accountable leaders and manage their own affairs in the hope they could achieve a better life for themselves, but more so for their children, to whom they do not wish to leave a legacy of despair. Many sophisticated bands already are operating more effectively than many municipal governments.

Implementation of the committee's recommendations is not without considerable risk. Indeed, we can expect some failures, but that's nothing new in the history of native and government relations. If there is a reasonable balance of successes, we will have made progress.

Keith Penner and his committee have produced that "one good idea" I found so elusive. A clergyman before he entered Parliament and representing a constituency with a large native population (Chatham) he has special credibility. The entire committee however deserves acclaim. We are not looking at a panacea for all native situations; conditions of non-status Indians, Metis and Inuit may prove at least as challenging. But what we have is a refreshing alternative to unacceptable failure.



Penner.

The entire committee however deserves acclaim. We are not looking at a panacea for all native situations; conditions of non-status Indians, Metis and Inuit may prove at least as challenging. But what we have is a refreshing alternative to unacceptable failure.

BARNEY DANSON
Toronto

Righting the wrong

Donald Marshall, a Nova Scotia Indian of the Micmac Nation, was sentenced to life and served 11 years in prison for a murder he did not commit. He was convicted in Capé Breton in 1971 at the age of 17 of the murder of his 16-year-old friend, Sandy Seale. The conviction was gained with perjured evidence, and the witnesses who gave false testimony contended that they were under pressure from the police.

Mr. Marshall protested his innocence throughout his years in prison. On one occasion he reports that he was denied a Christmas parole with his family because he refused to admit guilt. He appealed for help to the Nova Scotia Ombudsman, politicians and a lawyer. Eventually the Royal Canadian Mounted Police reopened investigation of the case, and reported enough evidence to charge another man.

A five-judge panel of the Supreme Court of Nova Scotia reheard the case and unanimously acquitted Mr. Marshall. A charge was laid against Roy Ebsary in the death of Sandy Seale, and a jury of seven men and three women this month convicted him of manslaughter.

Mr. Marshall's legal bill of \$82,000 remains unpaid, not to mention any compensation for those 11 years in jail. The lawyer who carried his case through to freedom has quit private practice to work for the federal Government, saying that he cannot carry the bill for the Marshall case. Mr. Marshall now works as a plumber on an Indian reserve near Halifax.

Indian Affairs Minister John Munro says that he has heard representations of "a very moving nature" about the legal costs and other losses Mr. Marshall suffered in this "atrocious occurrence," but that "there is absolutely no authority in my department for payment." Federal Justice Minister Mark MacGuigan has said that he is "troubled" by the situation, but for Ottawa to pay the costs would not be "very good federalism." In this he is correct; administration of the law in this case belongs to the province of Nova Scotia. He said he would confer with Nova Scotia authorities.

Mr. Marshall's present lawyer will meet Nova Scotia's new Attorney-General, Ronald Giffin, today to discuss compensation.

This is one of the most serious miscarriages of justice that Canada has known in many years. The man robbed of 11 years of freedom is an Indian. Roy Gould of the Membertou Reserve in Sydney and publisher of the Micmac News has said of the circumstances surrounding the first trial of Mr. Marshall, "There was a lot of racial tension in the air, Sydney was a very uptight place." Three hundred delegates from across Canada to the Indian National School Conference demonstrated during the trial by marching down Sydney's main street and occupying a Department of Indian Affairs office.

Nova Scotia Attorney-General Giffin and his Government have the power to present special legislation providing compensation to Mr. Marshall. They should do so.

Crackdown on public servants

Premier René Lévesque is determined to keep the Quebec government's deficit from soaring above the \$3-billion mark by recouping \$426 million in public sector wages paid out since July 1. And last week he issued an ultimatum. If 300,000 public and parapublic workers do not accept wage rollbacks and freezes for the first three months of 1983, his government will unilaterally determine not only their salaries but also working conditions for the next two years. Then, he threw university campuses across the province into a tailspin by announcing that educational grants will be reduced. And he suggested that any financial shortfalls should be covered through cutting staff salaries by the same amounts as those threatened for the government's direct employees.

The current problems had their origins in the run-up to the 1980 referendum on sovereignty-association, when the Quebec government signed three-year sweetheart contracts with its employees. But, by last summer, the provincial deficit was rising so quickly that the province asked union members to forgo a scheduled July 1 increment. When they refused, Lévesque vowed to get the money back when the contracts ran out at the end of the year. To that end, he introduced Bill 70, which rolls back wages for the first three months of 1983 and then freezes them.

Although the province softened its stand last week, freezing but not rolling back wages for those paid less than \$16,583 a year and limiting cuts to 10 per cent for those making up to \$20,033, unions were still seething. That was because top-bracket hourly wage rates will be cut back as if recipients worked a full year, whereas many (most of them women) are part-timers whose yearly incomes are well below the \$16,583 limit.

While the unions seemed willing to avoid any drastic action for the time being, an ingenious work-to-rule campaign is scheduled to begin Jan. 1. In, among other places, the revenue department, where Quebecers' provincial income tax is collected, a union memo urges employees to go by the rule book, checking every return most meticulously to "indicate to all taxpayers every possibility they have for saving money." The unions thus hope to slow down the machinery—and redistribute some of the cash the government wants to retrieve from their wages.

—ANNE BEIRNE in *Quebec City*.



Marshall leaving court: a witness ignored, another turned away

NOVA SCOTIA

The question of innocence

Donald Marshall's fight to prove his innocence has been a brutally discouraging struggle. Convicted of murdering his friend 11 years ago, Marshall has broken both hands fighting off other inmates in federal penitentiaries while struggling to convince an inattentive legal establishment that he was not guilty. Then, the system finally began to respond. And last week he won partial vindication when a Halifax courtroom heard overwhelming testimony to his innocence. In a dramatic reversal, key witnesses changed their testimony, claiming that the Sydney, N.S., police forced them to incriminate Marshall at his 1971 trial. Further evidence clearly indicated that an ultraviolet 60-year-old man with a passion for sharp knives was most likely the killer.

From the beginning, the handsome and reserved Marshall, a Micmac Indian from the Membertou reserve near Sydney, maintained that Sanford Seale, his 16-year-old black friend, was stabbed to death on the evening of May 28, 1971, by one of two older men whom they met on a Sydney sidewalk. Last week, for the first time on the legal record, an eyewitness backed him up. James McNeil, 37, told a Nova Scotia Supreme Court appeal hearing that he and a companion, then 50-year-old Roy Ebsary, had been accosted that night by Seale and Marshall, who asked for money but were unarmed. He heard Ebsary say, "I've got something for you," saw him stab Seale hard in the stomach

and slash Marshall's arm before the youth could flee. Later, McNeil and Ebsary's 13-year-old daughter, Donna, watched Ebsary clean the knife. A forensic expert told the hearing that one of Ebsary's knives had fibres on it that matched the coats Seale and Marshall had worn that night.

Although their testimony would almost certainly have spared Marshall, neither McNeil nor Donna Ebsary testified in 1971. A week after the conviction, a guilt-ridden McNeil told the police what he had seen, but they ignored him. Donna Ebsary, who said that her childhood had been tormented by a volatile father who killed her pets and "beat up the household" when he was angry, also went to the police but was turned away. The police force's reputation was shaken further and the Crown's case weakened when last week two key witnesses from the 1971 trial retracted their original testimony. Both said that the police had intimidated them into lying to incriminate Marshall.

In the next two months the five Supreme Court justices who heard the new evidence will listen to more legal arguments before deciding whether to order a new trial, grant an acquittal, or uphold the original verdict. For Marshall, the wait is not over yet. Meanwhile, Sydney residents are questioning the integrity of the other central figures in the case: their own police.

—MICHAEL CLUGSTON in *Sydney*.

Acys tenderd by Prosecution. 09-85-0181

Ex 10 (a) - P 498



JUN •

Marshall to receive \$25,000

By PETER MOREIRA
and ESTELLE SMALL

Donald Marshall will receive a \$25,000 advance as part of compensation for serving 11 years in jail for a murder he did not commit, Attorney-General Ron Giffin announced Tuesday.

The advance will be paid "in the next few days" to hold Mr. Marshall over until a one-man inquiry into the compensation issue reports in the fall.

Mr. Justice Alex Campbell, head of the inquiry, privately recommended last week the province pay \$25,000 toward a final settlement.

Premier John Buchanan appointed Mr. Justice Campbell, a former P.E.I. premier, to the inquiry last month after intense political and public pressure.

Mr. Marshall, 30-year-old Cape Breton Micmac, served the time for the 1971 slaying of Sandy Seale in Sydney's Wentworth Park, but the Nova Scotia Supreme Court appeal division ruled last year he was innocent.

His lawyer, Felix Cacchione, said last night he is happy the government is acting "for the first time in positive fashion" since last May's ruling. He added the compensation should not divert attention from the need to know how Mr. Marshall was wrongly convicted.

"It was a politically astute move to ease public pressure on the government to act," said Mr. Cacchione of the \$25,000. "It will alleviate a heavy financial burden, but that should not detract from the fact an innocent man was convicted of murder."

The government had been reluctant to say anything about the Marshall case early in the session because any statements would prejudice the appeal of Roy Ebsary, who was later convicted in Seale's death.

Mr. Giffin said Mr. Justice Campbell made his preliminary recommendation without any prompting from the province and the government accepted it.

Mr. Giffin had said the province would not be bound by the commission's findings. He said yesterday the final report won't be binding just because an interim recommendation has been accepted.

Marshall to receive

(Continued from page one)

Premier Buchanan yesterday refused to speculate on what would happen if the final report recommended a compensation package of less than \$25,000. "That's an assumption that I'm not going to work on. And I'm not going to prejudge the judge."

Mr. Cacchione said Mr. Justice Campbell is not looking into the circumstances that led to wrongful conviction.

"It doesn't say anything about how Donald Marshall came to be convicted in the first instance, how he came to lose his first appeal because evidence was withheld," he said. "These are questions Nova Scotians and Canadians ask themselves and

need to have answered."

Opposition leader Sandy Cameron said he is pleased with the recommendation, which was made initially by a number of opposition members.

Cape Breton Labor Party leader Paul MacEwan said last month the province should pay Mr. Marshall part of his compensation while the inquiry was being carried out.

Having originally called for the commission to be dismantled, he wrote Mr. Justice Campbell and proposed an initial payment of \$100,000.

"This is what I had in mind," Mr. MacEwan said yesterday. "I know I had mentioned a ballpark figure of \$100,000 but I'm not going to quibble over figures."

Chronicle - Herald
April 4/84

09-84-0256-4

449
Mid Star

Entitled to \$328,000 compensation

Death row convict innocent

KYO (AP) — A death row convict spent 34 years behind bars and faced charges for allegedly killing a black rice dealer was freed today by a decision that nullified his sentence and declared him not guilty. Reporters cheered when the outcome of the retrial for Shigeyoshi Taniguchi, 53, was announced outside the district court in Takano, Japan's main southwestern island of Shikoku. "Everything I see is glittering," Taniguchi said in a news conference outside the courthouse. "All I want to do now is to return to my village and till the land." The Kyodo News Service said Taniguchi was entitled to receive the equivalent of \$328,000 in indemnity for the years he spent in prison.

"In my first years (in prison), I was very angry at the prosecutors, policemen and judges in my case," Taniguchi said. "Now, I have no feeling of hatred against them."

Among the crowd at the courthouse was Sakae Menda, 57, the first man to be declared not guilty in Japan in a retrial. His conviction was reversed in July, also after spending 34 years in prison.

In Taniguchi's case, the second such reversal, district Chief Judge Kiyoshi Furuchi ruled that prosecutors' evidence was inadequate for a conviction.

Taniguchi was accused of the February 1950 robbery-slaying of a 63-year-old black market rice dealer. The equivalent of \$36 was taken from the victim.

Taniguchi, then 19, was arrested a

month after the killing and has been in prison ever since. He was convicted and condemned to death by hanging in 1951.

Police said he confessed during four months of questioning, and that blood on his trousers matched that of the victim. Taniguchi said in court he was coerced into making a confession and challenged the results of the blood tests.

Taniguchi's initial appeals were rejected, and the death sentence was upheld by a 1957 Supreme Court ruling. He continued to wage a legal battle for a new trial and, in 1976, the Supreme Court finally granted his request, sending the case back to the district court.

Today's ruling came after 33 sessions of testimony in the retrial.

the... had...
 Ministry of Foreign
 Ministry... in a Tehran
 Radio broadcast... in London,
 said the bombings had "no
 connection whatsoever" with Iran.
 Responsibility for the series of
 blasts was claimed by a pro-Iranian
 group called Islamic Holy War,
 which also claimed to have set
 bombs in Beirut in April and October
 that killed 361 people, most of
 them U.S. and French troops.
 U.S., French, British and Italian
 troops make up the multinational
 peacekeeping force in Beirut.
 U.S. Marines in full combat gear

...pt to
 ... embryos to provide
 "spare parts,"
 the team... said yesterday.
 Prof. Carl Wood said his
 team had been asked to help
 research into the use of organs
 and tissue from embryos in
 transplant and graft surgery.
 Prof. Wood, head of the
 Queen Victoria Medical Centre
 in vitro fertilization team, did
 not say who made the requests,
 but said: "We've had two over-
 seas approaches from people
 who believe the IVF techniques
 could be used to grow embryos
 beyond the five- or seven-day

There would... a
 ... it... to
 ... we... to
 ... being... in the
 work."
 Prof. Wood said although
 spare-parts procedures might
 benefit the sick, they would
 result in the death of the em-
 bryo.
 IVF involves fertilizing an
 egg outside the body and rein-
 serting it in the womb.
 The Government of Victoria
 state has lifted an eight-month
 ban on certain techniques being
 developed by the Melbourne
 team — a ban imposed partly
 because of the possible conse-
 quences.

Gulf...
 ... and...
 ... attacks might
 solve of the six-...
 ... Council, form...
 as a result of the...
 The Council is made up of
 wait, Saudi Arabia, Bahrain,
 the United Arab Emirates
 Oman.
 Mr. Griffin said U.S. fire
 experts were coming to Kuwait
 investigate the bombing.
 He said one U.S. company
 moved its American personnel
 dependents yesterday "but this
 not done upon recommendati-
 the U.S. Embassy."
 The U.S. business commu-
 numbers about 2,500 in Kuwait.

AROUND THE WORLD

Canadian given suspended sentence

ANKARA — A Canadian accused of insulting
 Turkish President Kenan Evren has been sen-
 tenced to a suspended 10-month prison term in
 the western city of Denizli, his lawyer, Veli Deve-
 cioglu, said. Bernard Beaulieu, a Quebec Govern-
 ment computer technician, is expected to be
 able to leave Turkey when the appeal process
 becomes final in a week's time, Mr. Devecioglu
 said. The defence does not plan to appeal, but
 prosecutors can file an appeal within a week af-
 ter the court's verdict. Mr. Beaulieu was charged
 with insulting General Evren while watching the
 President on television in the lobby of a hotel in
 Denizli.

der. Mervyn Russell, 39, may get as much as
 \$100,000 in compensation for the six years he
 spent in prison. Mr. Russell was jailed for life in
 1977 for stabbing 20-year-old Alison Bigwood to
 death. Last week the court set him free after
 hearing new pathological evidence that showed
 the handful of hair found in the victim's hand
 could not have been Mr. Russell's.

said those accepting will be allowed to take
 in 1985 elections.

Dynamite bombs rock U.S. recruiting office

EAST MEADOW, N.Y. — Two dynamite
 bombs hidden in attache cases rocked a U.S. Navy
 recruiting station moments after 170 occupants fled
 in response to a telephone threat. No injuries were
 reported. A group calling itself the United Front
 claimed responsibility for the blasts in the four-
 story building in East Meadow, officials said.
 The group also issued a communique criticizing
 U.S. actions in South and Central America.

Yugoslav minister is dismissed

BELGRADE — The Yugoslav Government has
 announced that Finance Minister Jozef Florijancic
 will be dismissed, but said he will be given
 another Government post. It gave no reason for
 what Western diplomats consider a highly unusu-
 al move, but sources said Mr. Florijancic had
 resigned because of a dispute over next year's
 budget and planned financial reforms.

Two bombs planted in British cities

LONDON — A small bomb demolished an
 unoccupied telephone booth last night in Oxford,
 a few hours after police cleared out thousands of
 shoppers so the bomb squad could defuse a
 kilogram charge planted in a busy London street.
 Police blamed the Irish Republican Army for the
 London bomb, but there was no immediate
 indication as to who was responsible for the
 explosion in Oxford. No group immediately
 claimed responsibility for either bomb.

Bolivia paralyzed by general strike

LA PAZ — Bolivia was virtually paralyzed
 yesterday by the second general strike in three
 weeks, union sources said. Public transport was
 working to some extent in the capital, but other
 public services and virtually all private business
 came to a halt at the start of the 48-hour stop-
 page. Unions want the Government to raise the
 minimum monthly wage to \$240 from the current
 \$62 to cope with sharp price increases.

Four bombs exploded on Chilean protest day

SANTIAGO — Terrorists exploded four
 bombs yesterday, including one that killed a
 train, on a Day of National Indignation
 protest against the Chilean Government's new
 mining law. A large crowd of an 18-car freight train
 was hit last Monday night in San Antonio,
 a town 100 miles from Santiago. The train
 was carrying a large amount of copper ore.
 The explosion killed a 19-year-old man and
 injured 11 others.

100 Nicaraguan rebels accept amnesty offer

MANAGUA — More than 100 U.S.-backed
 rebels have handed themselves over to Nicaraguan
 authorities, accepting an amnesty offer from
 the Sandinista Government, Victor Triaes
 of the ruling junta said yesterday. He said the
 rebels, who were present at the headquarters of
 the city of Escuintla, had been offered a
 full pardon by the Government. The rebels
 had been fighting for the overthrow of the
 Sandinista Government.

Man is set free on new evidence

LONDON — Two legal appeals, a television
 documentary and years of campaigning by pres-
 sure groups have finally resulted in the release
 from prison of a man wrongly convicted of mur-
 der.

Dec 14/83

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Sudbury, Ontario
P3E 1L4

5 December 1983

Attorney General of Nova Scotia
The Honourable Harry W. How, Q.C.
Department of the Attorney General
Provincial Building
Halifax, Nova Scotia
C3L 2L6

Dear Sir:

Re: The Trial of Roy Ebsary

It seems wrong to me that a sixty year old man would be jailed for defending himself against two able-bodied teenagers who were attempting to rob him. This was a potentially life threatening situation for Mr. Ebsary, who had every right to defend himself to the best of his abilities rather than politely hand over his billfold to these two young men.

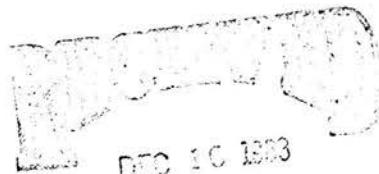
I do not understand why Mr. Ebsary was not acquitted on the grounds of self-defence. The jailing of Mr. Marshall although unfortunate, should have no bearing on the manslaughter charge as Judge Rogers seems to imply.

I would appreciate an explanation of this matter as I feel very strongly about it.

Sincerely,



Ron Mulholland



ATTORNEY GENERAL

Chronicle Herald
Sat Jan 12/85

19-82-0311-08

Marshall testifies Ebsary stabbed Seale

SYDNEY — Claiming that parts of testimony he had given at previous trials were untrue, Donald Marshall Jr. told a Supreme Court jury here Friday that Roy Newman Ebsary of Sydney stabbed the late Sandy Seale near this city's Wentworth Park on the night of May 29, 1971.

Marshall, acquitted of murdering Seale by the Nova Scotia Appeal Court in May, 1983, after serving 11 years in penitentiary, said during the first day of testimony in Ebsary's third manslaughter trial that he heard Ebsary ask the victim if he "wanted everything he had."

Ebsary, he added, put one hand on Seale's shoulder, removed the other hand from his pocket and then stabbed the teenager. He said Seale "bent over and fell down."

In the meantime, Marshall said he grabbed Jim MacNeil, who was with Ebsary, and "threw him down."

After striking Seale, he testified that Ebsary said, "I got something for you too, Indian," and the accused came toward him with something in his hand. With the Crown prosecutor using a ruler as a knife, Marshall demonstrated to the jury how he pushed Ebsary's hand aside, and how the accused stabbed him in the lower arm, leaving a five-inch scar.

Marshall said that neither he or Seale was armed, and that the whole thing started when either Ebsary or MacNeil had asked him for a cigarette.

Under cross-examination by Ebsary's lawyer, Luke Wintermans, Marshall said that most of a statement he gave to the RCMP in penitentiary in 1982 was not true, particu-

larly the portion in which Marshall said he and Seale had agreed to "roll somebody" in the park on the night of the incident.

Marshall also said references made by Wintermans to evidence he gave on previous occasions were also untrue. When asked by Wintermans why his testimony was different from other court appearances, Marshall replied that he stuck to his story for eight or nine years and nobody believed what had happened, so he changed his story to what he thought people wanted to hear.

"I told the truth the first time," he said. "I didn't go there to rob them. I was forced to say that. I didn't roll or rob anybody, a person bummed a cigarette and that's what happened."

The frail-looking 31-year-old Micmac, bothered by a cold that often made his voice inaudible, was one of 10 witnesses heard by the seven-woman, five-man jury.

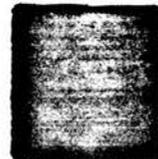
Among the others who took the stand were Ebsary's son Greg, who identified 10 knives seized from the Ebsary home by the RCMP in 1982, and Maynard Chant of Louisbourg. Chant, who was 14 at the time of the stabbing, admitted to giving a false statement in 1971 in which he said he saw Marshall stab Seale. The witness said that when he tried to tell the truth, city police would not accept it. He went on to testify that when approached by RCMP in 1982 he had come to realize that "I did wrong and felt it was time to tell the truth."

When the trial resumes Monday, Marshall will be back on the stand for redirect examination by Edwards.

AG - Wilma left this with me
to prepare a reply for you.
Franklin - I do not think it
should be replied to as the
appeal period is still
running.

[Signature] O.K.R.

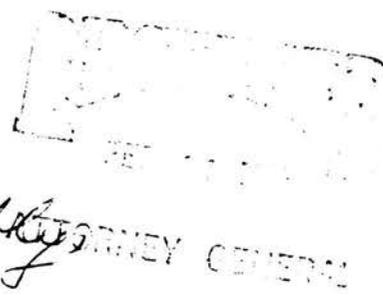
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09-84-0261-01	
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CLOSED	<input type="checkbox"/> YES <input type="checkbox"/> NO



Box 11, Blue Land,
Richmond Co., N.S.,
BOE 150,

Jan. 31st, 1985.

Mr. Ron Giffin,
Attorney General,
Province of Nova Scotia,
House of Legislative Assembly,
Halifax, N.S.

A rectangular postmark is stamped in the upper right corner of the letter. It contains the text "NOVA SCOTIA" at the top, "HALIFAX" in the middle, and "ATTORNEY GENERAL" at the bottom. The postmark is slightly faded and partially overlaps the recipient's address.

Dear Mr. Giffin:

A young friend of mine has a saying: "If it were not for the BAD victim, there would be no poor, unfortunate criminals!"

Certainly this would seem so, in the case of aged Mr. Ebsary, accused and found "guilty?" of murdering Sandy Seal.

All Mr. Ebsary was guilty of, was sitting in a park with a friend, who he was the victim of a robbery by two young thugs.

Now that this aging war veteran (many times decorated) has been virtually crucified by the Law, we

94
Is it that Donald Marshall (is not
tried on the charge he DID commit?
Why let him go scott-free with a large
sum of money to boot?

It seems to me that Propaganda,
beginning in Ontario, and working its
way East, already had freed Marshall of
his crime and largely was responsible
for convicting Ebsary, before the case came to trial.

There are firms in Ontario, which
can be hired, to conduct any kind of
money-raising campaigns. Did Marshall
hire one of these to act on his behalf?

The words of Mr. Seal, senior, father of
Sandy Seal, should not be taken lightly.
No Indian would be that much outspoken
(white versus Indian where an injury is
concerned) unless he had a good, solid
reason.

Mr. Seal^{sr.} had been a taxi-driver in
the Sydney area for a number of years.
In this Province we have always
treated our Indians well. I don't like
the inference that we throw innocent

3/ Indians in jail, for years and years, for crimes they do not commit.

But it is now on legal record that we do - and did -

All for Ontario - started propaganda that freed Marshall and convicted Ebsary.

Therefore, to vindicate this Province, not only for the Present but for the Future, Donald Marshall must be brought to Trial for the crime he very well did commit.

Now, had Mr. Ebsary given them his knife, at their demand, when he was ordered to empty his pockets, is there any assurance that they would not have used the knife on him? Is it logical to give a pair of criminals - younger and much stronger than the victim - A WEAPON that they could use against him? In the actual occurrence of the robbery?

What is the matter with the Brain or Thinking-Power, of our Jurors, anyway? Didn't they judge on the merits of News, Media Propaganda - and not on the Merits of the Trial?

4/ What Proof is there that young Seal was Marshall's accomplice, and not someone else, or ^{if} was Seal murdered and left there? The words of Mr. Seal, son, make me suspicious, although I know only what I read in the papers, or hear on T.V.

as the thing stands, I can feel only disgust and grief, at this whole miscarriage of justice, right here in my own Province.

It is a horrendous and cowardly crime, for any younger person, to attack, rob (or murder) the aging, old or infirm.

There has been altogether too much of these kinds of acts of late.

Such crimes should be subject even up to the Death Penalty, along with such attacks on policemen and prison guards. It should be stopped right out.

5
Please see that Donald Marshall
— who is not an innocent man — be
brought to Trial for the crime he DID
commit — Even if so much time has
gone by that it takes a special Act of
The Legislature to do it.

Let Justice properly be done!

Re Mr. Ebsary: If he does not
or has exhausted his Appeals, where will
an old man like this be placed, for his
3 year sentence? Jail would probably
kill a man this old, and he was not
given Execution, but a 3 year ~~term~~ term.
In my opinion, ^{if not get free,} he should be incarcerated
in some kind of home, rather than a jail.

I don't know the man, but I, too, am
growing old. And I speak as a Senior Citizen
who, also, grew up in the Depression and
then into the Second World War. As a
resident of Halifax, I did all I could or
knew how, to bring that War to an end,

67 Hungry, as a little child, I walked
the ~~happier~~ streets, but never once entered

a store to steal so much as a cookie.
We just ^{couldn't} do it.

I do not go along with the theory that
deprivation causes the young to act
that way of robberies and other crimes.
It's how they are disciplined. And what rules
of life they are taught.

Who has a better right than a
war veteran, to sit quietly in a
Public Park, of an evening, with a
friend? Without molestation of any
kind! The indignity and insult of being robbed by two
young punks would cause anyone to lash back. Also,
he must have been scared. Yours truly,

Edith H. Smith.

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EIGHTY-THIRD YEAR, NO. 112

SYDNEY, NOVA SCOTIA, FRIDAY, MAY 13, 1983

Roy N. Ebsary Charged With Murder Of Seale

A grizzled, 71-year-old war veteran Thursday was charged with second-degree murder in the death 12 years ago of sixteen-year-old Sandy Seale.

Roy Newman Ebsary remained motionless when Judge Charles O'Connell read the charge at the accused's bedside in City Hospital where he has been confined for several weeks with a fractured neck, an injury suffered when he fell down a flight of stairs in his apartment house.

Ebsary was remanded until Thursday for preliminary hearing. He is in a head to waist cast but will be released from hospital this week-end and taken to the Correctional Centre until his court appearance on Thursday.

On Tuesday, Donald Marshall, Jr., 29, was acquitted of the 1971 murder of Seale after spending 11 years in Dorchester Penitentiary for the crime he always maintained he did not commit.

During a review of the case by the Nova Scotia Supreme Court, ordered by the federal government, a number of witnesses said they had lied at the original trial and one said he had seen another man stab Seale in Wentworth Park.

Rev. Captain Roy Newman Ebsary, as he likes to be called, says he is a seadog, a fanatical knife collector and a minister in the Universal Life Church, Inc.

He is well known in Sydney for walking the streets in a black cape and a captain's hat.

Ebsary must appeal to the Supreme Court for bail, a hearing that probably

will not take place for a couple of weeks. Ebsary, whose daughter told a court last December her father once "ripped the head" off her pet budgie, was remanded in custody until next Thursday. Hospital officials said they expect him to be discharged Monday.

Ebsary's name came up during the Supreme Court's review of Marshall's conviction late last year.

James MacNeil, 37, told the court that he and Ebsary had been walking through a city park when Marshall and Seale tried to rob them. MacNeil said that while he wrestled with Marshall, Ebsary stabbed Seale.

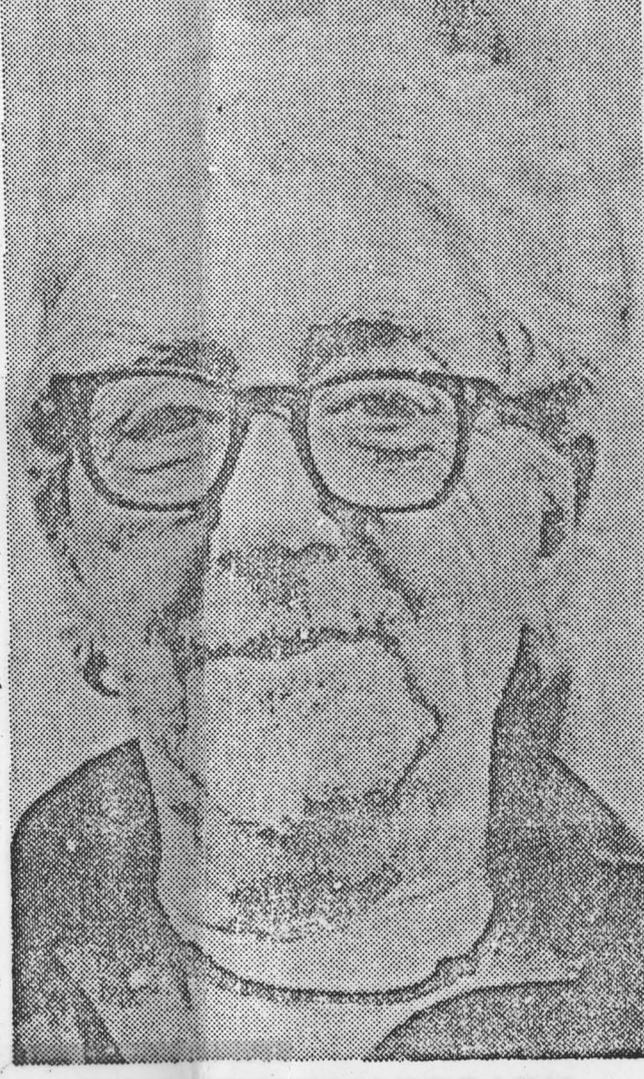
MacNeil said he heard Ebsary tell Seale: "I've got something for you," and then saw him drive a small knife into the young black man.

MacNeil, who didn't testify at Marshall's original trial, said he accompanied Ebsary to the older man's home where he watched him wash the blood from his knife and hands.

MacNeil said he went to Sydney police about two weeks after Marshall was convicted and gave a statement about what had happened.

Last year the RCMP uncovered new evidence and then-justice minister Jean Chretien instructed the Supreme Court to review Marshall's conviction. The court decided to hear seven witnesses, including some from the original trial.

One so-called eyewitness from the original trial told the court he lied when he said he saw Marshall stab Seale. He said he was scared and felt under pressure to give an untrue statement.



ROY NEWMAN EBSARY

Five Fishermen Arrested Supply Officers Firearm

WEST PUBNICO, N.S. (CP) — Five fishermen were arrested Thursday following a dispute over lobster traps that exploded this week, turning this tiny southwestern Nova Scotia fishing community into a war zone.

The men were scheduled to appear in court in nearby Yarmouth today in connection with a rampage by more than 100 fishermen on Wednesday.

During the outburst, the men chased two boats under lease to the federal Fisheries Department to a local wharf. Fishermen aboard 30 boats then rammed, burned and sank the two vessels, worth \$60,000 and \$30,000, while RCMP stood helplessly.

RCMP would not say Thursday night what charges would be laid, but a police spokesman earlier said charges relating to piracy and arson were being drafted.

The dispute, which started

this spring when the department stepped up regulation of the lobster fishery, took another sober twist Thursday when the department said it had supplied some officers with firearms.

Pierre Comeau, regional director of operations for the department, said officers aboard the 40-metre patrol vessel Louisburg had been armed with handguns and shotguns.

"They have been trained to use these arms and they have been trained to use them for defensive purposes in extreme emergency cases only."

The action caused concern among fishermen and local politicians. Nova Scotia Fisheries Minister Ken Streach, who said he could not support the fishermen's actions, also said he did not agree with the arming of fisheries officers.

Streach said he believed the

federal Fisheries Department was enforcing regulations with

In Ottawa, Minister Pierre Elliott Trudeau said he would continue the "criminalization" of fishermen.

"I will be possible to regulations with protection of the law-abiding fishermen."

The fishermen because fishermen have been hauling up check for tag department. have destroyed that have no tagged.

The fishermen maximum 375 many of the tag in foul weather been unusable replacements.

Court - Martial Verdict Against Cadet Quashed

TORONTO (CP) — The Department of National Defence has quashed a court-martial verdict against a 20-year-old female cadet who was found sharing a marijuana cigarette with a classmate at Royal Military College in Kingston, Ont.

Citing legal advice from the federal Department of the Judge Advocate-General, the Defence Department quashed all charges against Carol Ann Murphy of Renfrew, Ont., who had been convicted by a military tribunal Feb. 2 of trafficking in a narcotic.

The department refused to give details on what legal advice led it to quash the verdict, but Murphy's lawyer, Michael O'Connor, said it might have been "internal irregularities" in the way the matter was investigated and tried.

"About six days or more elapsed before he was made aware that she was facing charges, and she wasn't aware till it was too late," he said Thursday in a telephone interview from Ottawa. "She had already said things that worked against her — the right to re-



Cadet Murphy

said. "I thought maybe it was to do with the appeal."

Murphy's father, Garry, a car salesman in her home town near Ottawa, said he "felt terrific" about the decision.

She as charged student at the discovered her marijuana with cadet

Schilbe, tried summary trial and reprimanded college's commandant.

Schilbe said "happy and decision and his fine."

WIPED FROM: Jan Martins charges will be Murphy and the charges will be wiped O'Connor said about to file a learned the quashed by the of court-martial.

The lawyer ned to argue Murphy's right stitution were she was not g retain counts investigation of He also said was achieved evidence. N victed on the

Courts Should Be Given Power To Order Reimbursement On Acquittals Says Bar

OTTAWA (CP) — The courts should be given the discretionary power to order reimbursement by the Crown of legal expenses incurred by people who have been discharged or acquitted of an indictable offence, the Canadian Bar Association said Thursday.

"It can be argued that complete justice has been done" in such cases as Donald Marshall of Sydney, and Susan Nelles of Toronto who both had to pay substantial legal expenses and were ultimately cleared of murder charges by the courts, said

association president Yves Fortier in a news release.

"It seems unfair that courts should have no power to compensate them for such expenses."

Marshall, 29, was acquitted Tuesday by the Nova Scotia Supreme Court of a 1971 murder after spending 11 years behind bars for a crime he always maintained he did not commit.

The case was reviewed by the Supreme Court on order by the federal government after new evidence was uncovered by the RCMP in Sydney. Another man was

charged Thursday with second-degree murder in the death of a teen-aged youth 12 years ago.

In May, 1982, Nelles was cleared in provincial court of murdering four infants with drug overdoses at the Hospital for Sick Children following a 44-day preliminary hearing. Police and provincial authorities are still unable to explain the deaths of the babies.

However, it was estimated that Nelles's defence expenses would cost \$200,000.

And Ontario Attorney General Roy McMurtry said

at the time that the province would not compensate Nelles. He said no request for compensation had been made and that the issue is complicated by the operation of the justice system.

"A preliminary hearing is not set up in such a way as to demonstrate the probable innocence of the accused," he said. The hearing is set up to determine whether there is enough evidence to put a person on trial.

But lawyers and jurists are "very much concerned with inequalities in the existing

legal system," Fortier said.

"Courts should have the discretion to order compensation by the Crown in cases of obvious inequity."

The association, which has been studying the issue since its annual meeting last summer, will hear the recommendations of its criminal law section at the meeting in August.

"Once the recommendations are approved by the CBA, they will be forwarded to federal and provincial governments."



Back in 1971: Donald Marshall, accused of fatally stabbing a 16-year-old black teenager in a park, is led into a Sydney, N.S., courtroom 13 years ago.

A jury later convicted him, and the Micmac Indian served nearly 11 years for a murder he never committed. Evidence indicated police pressured young

witnesses at the trial and attempted to cover up mistakes made in the case. Nova Scotia opposes holding a public inquiry.

CP PHOTO

Calls grow for Marshall inquiry

No justice until his 11-year ordeal gets full hearing supporters say

By Alan Story Toronto Star

While most of the facts are already known, the Donald Marshall saga can never end until it is examined by a full, public inquiry, his friends and supporters say.

Marshall, who spent nearly 11 years in prison for a killing he didn't commit, recently accepted compensation of \$270,000 from the Nova Scotia government.

But the calls continue for an official inquiry into the circumstances of his 1971 arrest and conviction for the stabbing death of his friend, 16-year-old Sandy Seale.

Proponents argue that a public inquiry could hear all relevant witnesses, fill in remaining gaps in testimony and assign blame for the miscarriage of justice.

Full disclosure

The probe could also suggest ways of preventing such tragic mistakes in the future.

Yet once again — during the current Nova Scotia provincial election campaign — Premier John Buchanan and Attorney-General Ron Giffin have refused to hold such an inquiry.

"As I appreciate from Donald Marshall's own comments, he would pretty well like the matter to go to rest," Buchanan said.

But it won't go to rest.

Felix Cacchione, Marshall's Halifax lawyer, said his client realizes an inquiry would be painful and put him back in the public limelight. But the Micmac Indian, now 31, wants a full disclosure of errors and cover-ups that he believes led to his imprisonment, Cacchione added.

The 1971 knifing occurred as Marshall and Seale tried to mug two men in a Sydney, N.S., park, according to later testimony. Marshall's murder conviction was



UPC PHOTO

Happy ending: An ecstatic Donald Marshall flashes a victory sign in May, 1983, after learning that he has been acquitted of murder and will soon be freed from prison. He recently accepted compensation of \$270,000.

reversed last year and he was freed.

All of the characters in the dramatic story, except the crown attorney who handled Marshall's original prosecution, are still alive.

All have told their stories — except for a few details — of what happened in the park when the black teenager was fatally stabbed. They have related how Sydney police grilled 13-, 14- and 15-year-old witnesses, how lies were told during Marshall's trial and how, a week after the trial, a man told officers they had the wrong man.

Rev. Robert Hussey, a Moncton, N.B., United Church minister, has personally raised \$49,000 from concerned Canadians wanting to help Marshall. He said he is "dedicated to forcing the government to come forward with the answers . . . Their silence is outrageous."

Of the 2,600 letters Hussey has received

about the case, 1,800 support an inquiry. Micmac Indian leaders and Nova Scotia NDP leader Alexa McDonough also favor a fresh investigation.

Even members of the original jury that convicted Marshall want to know how they were "betrayed" into reaching a guilty verdict more than 13 years ago.

"The thing should be hashed out from the very beginning until the time he went to prison . . . They've got to go from the bottom to the top of the system," one Marshall juror said yesterday from Louisbourg, N.S. He did not want to be identified.

Buchanan refuses to establish an inquiry or discuss the Marshall case because he fears his comments might prejudice the prosecution of Roy Ebsary, 72, of Sydney, charged with manslaughter in Seale's death.

The Premier has stuck to this position

since May, 1983, when Ebsary was first charged. The accused was tried twice, successfully appealing his conviction. A third trial is scheduled for March, 1985.

With Buchanan's government expected to win re-election on Nov. 6, it seems unlikely that the Premier will be forced to comment on the distinction between Ebsary's guilt or innocence and Marshall's original conviction until the Ebsary case is over. With appeals, that could take until next fall.

But at least a partial inquiry into the Marshall affair could be held early next year, thanks to a libel suit launched last February. The suit was brought by John MacIntyre, Sydney's recently retired police chief and the main investigator of the Seale killing in 1971.

MacIntyre maintains that comments made on the CBC program *Sunday Morning* on Nov. 27, 1983, about his handling of the Marshall case were defamatory and injured his reputation.

If the libel case goes to trial as expected, the corporation's lawyers will likely ask most of the youthful witnesses who testified against Marshall at his 1971 trial to repeat why they lied under pressure from Sydney police.

Nervous breakdown?

Some new revelations may also emerge.

But until there is a full inquiry — ideally, it should be conducted by someone from outside the Nova Scotia power structure — people like Hussey will keep writing letters to the editor and asking questions.

Among their queries: Is it true that John Pratico, then 16, one of the main witnesses at the Marshall trial, suffered a nervous breakdown as a result of investigators' pressure and was taken to hospital under police escort?

What was the role of the province's then attorney-general, Leonard Pace, in the November, 1971, revelation that Marshall didn't kill Seale?

Pace was one of the five justices of the Nova Scotia Supreme Court's appeal division who, in May, 1983, concluded that Donald Marshall was "the author of his own misfortune."

Donald Marshall -

Inquiry

09-84-0256-01

NOTES FOR A STATEMENT

BY THE HON. R. ROY MCMURTRY, Q.C.
ATTORNEY GENERAL FOR ONTARIO

AT THE CONSIDERATION
OF THE ESTIMATES OF
THE MINISTRY OF THE ATTORNEY GENERAL
BEFORE THE ONTARIO LEGISLATURE STANDING COMMITTEE
ON THE ADMINISTRATION OF JUSTICE

1000 HOURS
DECEMBER 1ST, 1982

WITH THE ADMINISTRATION OF JUSTICE AND DELIBERATE CONDUCT LIKELY TO IMPEDE THE ADMINISTRATION OF JUSTICE".

WE IN THE MINISTRY ARE MONITORING THESE DEVELOPMENTS CLOSELY. WE BELIEVE THAT MUCH CAN BE DONE, IN CO-OPERATION WITH THE PRIVATE BAR, TO DEVELOP STANDARDS OF BEHAVIOUR WHICH WILL RESULT IN ACCUSED BEING SATISFACTORILY REPRESENTED, AND THE TRIAL PROCESS EXPEDITED AT THE SAME TIME.

THE LAST ITEM I WOULD LIKE TO DISCUSS THIS MORNING IS A VERY IMPORTANT AND SENSITIVE ONE. I REFER TO THE QUESTION OF WHETHER AN ACCUSED INDIVIDUAL ACQUITTED AT TRIAL, OR DISCHARGED AT A PRELIMINARY HEARING, SHOULD BE COMPENSATED BY THE STATE FOR THEIR LEGAL EXPENSES, AND PERHAPS FOR OTHER EXPENSES INCURRED AS A RESULT OF THE TRIAL OR PRELIMINARY HEARING. THIS SUBJECT WAS RAISED MOST RECENTLY BY THE DISCHARGE OF MISS SUSAN NELLES AFTER A LENGTHY PRELIMINARY HEARING. I HAVE NO WISH TO DISCUSS HER CASE, PARTICULARLY IN VIEW OF THE FACT THAT THERE ARE CIVIL CASES PENDING CONCERNING COMPENSATION. WHAT I WOULD LIKE TO DO, HOWEVER, IS TO BRIEFLY DISCUSS SOME OF THE VERY DIFFICULT ISSUES OF PRINCIPLE RAISED BY THIS ISSUE.

AS HONOURABLE MEMBERS MAY BE AWARE, I HOPE TO TABLE IN THE LEGISLATIVE ASSEMBLY, WITHIN THE NEAR FUTURE, A DISCUSSION PAPER SETTING OUT IN MORE DETAIL THE OPTIONS AVAILABLE TO THE PROVINCE IF IT WISHES TO INSTITUTE A MECHANISM FOR

COMPENSATING THOSE ACQUITTED OR DISCHARGED. THE CHALLENGE WILL BE TO DEVISE A SCHEME THAT IS FAIR AND WORKABLE. IT WOULD BE COMPLETELY UNACCEPTABLE IF WE WERE TO SET UP A SCHEME WHICH HAD THE EFFECT OF INTRODUCING MIDDLE VERDICTS OF "NOT QUITE INNOCENT" INTO CANADIAN LAW, FOR THOSE WHO HAD PERSUADED THE JURY THAT THERE WAS A REASONABLE DOUBT ABOUT THEIR GUILT, BUT WHO NEVERTHELESS HAD NOT PERSUADED THE JURY THAT THEY WERE SUFFICIENTLY INNOCENT AS TO MERIT COMPENSATION.

NOR WOULD I WANT A COMPENSATION SCHEME TO DISTORT THE FUNDAMENTAL BALANCE OF THE CRIMINAL TRIAL. I AM NOT SPEAKING SOLELY OF THE INTERESTS OF THE CROWN. I THINK THAT AN ILL-DESIGNED COMPENSATION SCHEME MIGHT HAVE THE EFFECT OF BEING GROSSLY UNFAIR TO THE ACCUSED. LET ME GIVE YOU TWO EXAMPLES. WE HOLD THE RIGHT AGAINST SELF-INCRIMINATION VERY HIGHLY. NO ACCUSED SHOULD BE COMPELLED TO TESTIFY IN HIS OWN DEFENCE. HOWEVER, IN SOME JURISDICTIONS WHICH HAVE COMPENSATION SCHEMES, THE PRACTICAL EFFECT IS TO COMPEL THE ACCUSED TO TESTIFY, SINCE WITHOUT AN AFFIRMATIVE DEFENCE, HE IS UNLIKELY TO RECEIVE COMPENSATION. I HAVE NO WISH INDIRECTLY TO FORCE THE ACCUSED TO TESTIFY. SECONDLY, INTRODUCING QUESTIONS OF COMPENSATION MAY MAKE IT DIFFICULT FOR A JURY TO WEIGH AS SCRUPULOUSLY AS JURIES NOW DO, THE QUESTION OF THE GUILT OF THE ACCUSED. WOULD A JURY BE MORE LIKELY TO CONVICT, IN A BORDERLINE CASE, IF IT FELT OUTRAGED BY THE FACT THAT THE ACCUSED WOULD NOT MERELY GO FREE, BUT WOULD BE COMPENSATED AS WELL? I DO NOT KNOW, BUT THE EXPERIENCE

OF OTHER JURISDICTIONS LEADS ME TO BELIEVE THAT WE HAVE TO CONSIDER THIS AS A SERIOUS POSSIBILITY.

LET ME SPEAK A LITTLE ABOUT THE OPTIONS WE ARE CONSIDERING. THE QUESTION OF COMPENSATION FOR ACQUITTED ACCUSED HAS BEEN CANVASSED IN A NUMBER OF COMMISSION REPORTS ACROSS CANADA. TO DATE, HOWEVER, NO JURISDICTION HAS IMPLEMENTED ANY SCHEME. I THINK THAT THERE ARE BASICALLY SIX ALTERNATIVES WHICH HAVE TO BE CONSIDERED.

THE FIRST IS A FORMALIZED SYSTEM OF EX-GRATIA PAYMENTS. THIS WAS THE SUGGESTION OF CHIEF JUSTICE MCRUER IN HIS CIVIL RIGHTS REPORT, AND HE SUGGESTED HAVING A PANEL OF SUPREME COURT JUSTICES TO ADVISE THE CABINET ABOUT EX-GRATIA PAYMENTS TO MERITORIOUS ACQUITTED ACCUSED.

THE SECOND AND THIRD ALTERNATIVES GIVE THE JUDGE POWER TO MAKE A COMPENSATION OR COSTS AWARD FOLLOWING THE CONCLUSION OF THE TRIAL OR PRELIMINARY HEARING. SOME JURISDICTIONS GIVE THE JUDGE A VIRTUALLY UNFETTERED DISCRETION: THIS IS THE SECOND ALTERNATIVE. THE THIRD ALTERNATIVE IS FOR THE LEGISLATURE TO LAY DOWN RIGID AND FORMAL GUIDELINE TO ASSIST THE JUDGE IN DETERMINING WHETHER AN INDIVIDUAL OUGHT TO RECEIVE COMPENSATION. THE MAJOR PROBLEM WITH FORMAL GUIDELINES IS THAT THEY COMPLICATE THE JUDGES CONSIDERATION OF THE FACTS OF THE CASE AS IT IS PROCEEDING. THE JUDGE MUST NOT SIMPLY FOCUS ON THE GUILT, OR OTHERWISE, OF THE ACCUSED, BUT WEIGH IN HIS MIND A WHOLE SERIES OF OTHER FACTORS, RELEVANT ONLY TO

THE COMPENSATION QUESTION. THE EXPERIENCE OF OTHER JURISDICTIONS WITH HEAVILY STRUCTURED GUIDELINES IS THAT FEW AWARDS IF ANY ARE MADE.

THE FOURTH ALTERNATIVE IS TO SET UP A BROAD BASED COMPENSATION SCHEME ADMINISTERED BY A TRIBUNAL. I SUPPOSE THE NEAREST ANALOGY WOULD BE THE CRIMINAL INJURIES COMPENSATION BOARD. UPON PRESENTATION OF A CERTIFICATE OF ACQUITTAL OR DISCHARGE, AN INDIVIDUAL WOULD BE ENTITLED TO MAKE APPLICATION FOR AN AWARD TO COVER HIS EXPENSES INCURRED AS A RESULT OF HIS DEFENCE.

THE FIFTH ALTERNATIVE SUGGESTED IN ONE MINORITY REPORT OUT IN BRITISH COLUMBIA IS AN EXPANSION OF LEGAL AID, TO COVER RETROACTIVELY ACQUITTED ACCUSED, EVEN THOUGH THEY MIGHT NOT, INITIALLY, HAVE MET THE ELIGIBILITY GUIDELINES. I HAVE SOME VERY REAL CONCERNS ABOUT THIS ALTERNATIVE.

THE FINAL ALTERNATIVE WE ARE CONSIDERING IS MAKING CHANGES TO OUR TORT LAW TO FACILITATE THE BRINGING OF CIVIL LAW ACTIONS FOR BOTH COSTS AND DAMAGES. THIS HAS THE ADVANTAGE OF ENABLING THE CIVIL COURTS TO ANALYSE THE ISSUES SEPARATELY FROM THE PROCESS OF THE CRIMINAL TRIAL, AND ALSO TO BE ABLE TO ARTICULATE GUIDELINES FOR LAW ENFORCEMENT AUTHORITIES.

MR. CHAIRMAN, WE ARE REVIEWING ALL THESE OPTIONS IN CONSIDERABLE DETAIL, ANALYZING THE EXPERIENCE OF OTHER JURISDICTIONS, AND ATTEMPTING TO DETERMINE WHAT THE LIKELY COST OF SUCH A SCHEME WOULD BE TO THE TAXPAYER. I AM LOOKING FORWARD TO TABLING THE DISCUSSION PAPER IN THE NOT-TOO-DISTANT FUTURE, AND TO DISCUSSING THESE MATTERS AT LENGTH WITH MY COLLEAGUES IN THE ASSEMBLY.

09-8420257-01

July 15, 1983

Mr. Jonathan Rose
10 Glory Crescent
WEST HILL, Ontario
M1E 2B8

Dear Mr. Rose:

I have your letter, of July 4th, and advise that if and when Mr. Marshall, or someone on his behalf, makes an application for compensation we will give it our earnest consideration.

Thank you for writing.

Yours sincerely,

Harry W. How, Q. C.

EXECUTIVE COUNCIL



NOVA SCOTIA

Certified to be a true copy of an Order of his Honour the
Lieutenant Governor of Nova Scotia in Council made the
9th day of August A. D. 1977.

N. S. Regulation 77/77

FILED

Date: August 9 1977

Patricia D. Highland
REGISTRAR OF REGULATION

77-954

The Governor in Council on the report and recommendation of the Attorney General dated the 21st day of July, A.D., 1977, and pursuant to Section 7 of Chapter 151 of the Revised Statutes of Nova Scotia, 1967, the Interpretation Act, and Section 26 of Chapter 11 of the Acts of 1977, the Legal Aid Act, is pleased to make regulations in the form set forth in the Schedule attached to and forming part of the report and recommendation.

H. F. S. ...

H. F. S. ...
CLERK OF THE EXECUTIVE COUNCIL.

H. J. Swain
CLERK OF THE EXECUTIVE COUNCIL
77-454

ELIGIBILITY

1(1) Subject to the Act, an applicant is eligible to receive legal aid:

(a) when he receives all or part of his income pursuant to a program of municipal or provincial social assistance;

(b) when he does not receive any of his income pursuant to a program of municipal or provincial social assistance and he has an income equal to or less than that which he would be entitled to receive under Provincial Social Assistance; or

(c) when the obtaining of legal services outside of the legal aid plan would reduce the income of an applicant to a point whereby he would become eligible for the benefits under Provincial Social Assistance.

(2) A client who is eligible pursuant to subsection (1)(c) may be required by the Commission to make a contribution towards the payment of the costs of the legal services rendered on his behalf.

(3) An applicant shall not be required to dispose of his principal place of residence or assets necessary to maintain his livelihood.

2 Notwithstanding Section 1, where the income of an applicant for legal aid exceeds the amounts specified in Section 1, the applicant may be declared eligible for legal aid if the applicant cannot retain counsel at his own expense without him or his dependents, if any, suffering undue financial hardship such as incurring heavy indebtedness or being required to dispose of modest necessary assets.

APPLICATION

3 Applications for legal aid shall be made in the form shown in Schedule A

4 Applications for legal aid shall be accepted or rejected by a solicitor employed by the Commission or the Executive Director.

APPEALS TO THE COMMISSION

5 Where an applicant or client wishes to appeal to the Commission pursuant to Section 24 of the Act concerning refusal, suspension or withdrawal of legal aid or concerning cancellation or amendment of a certificate of legal aid, or concerning required contributions toward the cost of legal aid, the applicant or client shall submit to the Commission a written request for a review.

6 When the Commission receives a written request for a review, the solicitor or Executive Director who made the decision to be reviewed shall forthwith submit a written report to the Commission giving reasons for his action.

7 The Commission shall consider the report of the solicitor or the Executive Director and, upon the request of the applicant or client, the Commission shall hear the applicant or client in person regarding the review.

LEGAL AID SERVICES

8 An appeal against a decision, judgment, verdict or sentence of a Court may be taken where, in the opinion of a solicitor employed by the Commission and the Executive Director, the appeal has merit or where the Court appealed to requests the appointment of counsel.

9 Legal aid may be granted in such manner and in such matters as may from time to time be provided pursuant to any agreement respecting legal aid in force between the Government of the Province of Nova Scotia and the Government of Canada.

TERMS OF EMPLOYMENT BY THE COMMISSION

10 Salaries and pension, health plan, group insurance, sick leave, vacation and other benefits shall be provided to employees of the Commission on the same basis and scales as these are provided in the Department of the Attorney General.

11 The Executive Director shall be classified at the level of a Director in the Department of the Attorney General.

12 No person employed by the Commission may be a candidate in a municipal, provincial or federal election or otherwise engage in any activity which would interfere with his employment by the Commission without prior approval from the Commission.

13 No person who is a member of a city, town or municipal council, shall be employed by the Commission unless the Commission indicates by resolution it is satisfied that the duties of that office would not interfere with his employment.

14 No person who is a member of the House of Assembly or the House of Commons shall be employed by the Commission.

TARIFF OF FEES

15 Where the Executive Director determines that legal aid should be provided by a barrister in private practice who is to be compensated by the Commission, a certificate of eligibility shall be issued by a solicitor employed by the Commission.

16 Compensation paid pursuant to a certificate of eligibility issued in a non-criminal matter shall be at the rate of twenty-five dollars per hour to a maximum for the case determined by the solicitor who issued the certificate and agreement to this maximum shall be a condition of the retainer.

17 The fees in Schedule B shall be the Tariff of Fees and Disbursements for barristers in private practice engaged by the Commission to conduct criminal cases.

18 An account submitted by a barrister in private practice may be taxed by the Executive Director who may determine the proper fees and disbursements to be paid by the Commission.

19 A barrister who is not satisfied with the determination of fees and disbursements may appeal to the Commission and the Commission may make a determination of proper fees and disbursements as the Commission sees fit.

SCHEDULE A

Lawyer's Use Only

**NOVA SCOTIA LEGAL AID
Application for Legal Aid**

Office Use Only

Your Name: _____

Full Address: _____

Telephone: _____

Accepted
Rejected
Referred

Reasons

Office: _____

Staff Lawyer: _____

(Where advice only required)

STATUS: Male Married Separated Common Law Employed
 Female Not Married Deserted Dependents Unemployed
 Age Widowed Divorced No Dependents Unable to Work

Name of Husband or Wife _____

Address of Husband or Wife _____

Have you ever received legal aid services before? Yes No

Do you receive Social Assistance or other Public Assistance? Yes No

Dependents living at home **DEPENDENTS** (Spouse, child or person supported by Applicant) Dependents Living apart

Names:	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

Describe purpose of application or problem: _____

 Name of person who can assist: _____

 Can be contacted _____

If criminal matter or court proceeding, what is the charge or proceeding? _____
 Next Court Appearance? _____

	Yes	No
Was bail granted?	<input type="checkbox"/>	<input type="checkbox"/>
Have you elected?	<input type="checkbox"/>	<input type="checkbox"/>
Did you plead?	<input type="checkbox"/>	<input type="checkbox"/>
Did you have preliminary?	<input type="checkbox"/>	<input type="checkbox"/>
Did you have a trial?	<input type="checkbox"/>	<input type="checkbox"/>
Were you sentenced?	<input type="checkbox"/>	<input type="checkbox"/>
Are you in custody?	<input type="checkbox"/>	<input type="checkbox"/>

 Court or Judge: _____

Financial Data: Name of Person who can verify _____ Address _____

Monthly Incomes: Salary, Wages, Tips \$ _____ Unemployment Ins. Social Assistance Other Public Asst. Family Allowance..... Old Age Asst. Pension..... Other Income.....	Monthly Expenses: Rent \$ _____ Payments on home Heat/Fuel..... Taxes/Ins..... Electric..... Water..... Telephone..... Food..... Clothing..... Babysitter/Mealhd Medical/Drugs...	Motor Vehicle Year _____ Model _____ Make _____ Value \$ _____ Financed at..... Amount Owng \$ _____ Cash \$ _____ Bonds \$ _____ Securities \$ _____	Home Ownership Value \$ _____ No. Rooms _____ Condition _____ Total Debt \$ _____ Name of Mortgagee..... Total Value or Amount of Assets \$ _____ Real Estate \$ _____ Other (specify) \$ _____																		
Total Income	Total Expenses	<table border="1"> <thead> <tr> <th>Creditor</th> <th>Amount</th> <th>Monthly Charge</th> </tr> </thead> <tbody> <tr> <td>_____</td> <td>\$ _____</td> <td>\$ _____</td> </tr> <tr> <td>Totals</td> <td></td> <td></td> </tr> </tbody> </table>		Creditor	Amount	Monthly Charge	_____	\$ _____	\$ _____	_____	\$ _____	\$ _____	_____	\$ _____	\$ _____	_____	\$ _____	\$ _____	Totals		
Creditor	Amount	Monthly Charge																			
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_____	\$ _____	\$ _____																			
_____	\$ _____	\$ _____																			
Totals																					

READ DECLARATION AND AUTHORIZATION CAREFULLY

Applicant Declares:
 Information herein is true and complete. Applicant will furnish additional information as required. Applicant consents to have information investigated for verification and will notify of any change.

Applicant Authorizes:
 Nova Scotia Legal Aid to represent and act for Applicant in the matter mentioned or any related matter and further authorizes Nova Scotia Legal Aid to take any necessary action or obtain required assistance.

Signature of Applicant: _____

Date: _____

Please Ask for Assistance

Do Not Complete If Untrue.

SCHEDULE B

Tariff of Fees and Disbursements
for Barristers in Private Practice
Engaged by the Commission to
Conduct Criminal Cases

All fees in this Schedule shall be reduced by twenty-five percent.

INDICTABLE OFFENCES

Indictable Offences within the exclusive jurisdiction of the
Supreme Court under Section 427 of the Criminal Code (Canada) -

1. Preparation for preliminary hearing and trial,
including interviews with the accused and witnesses -
per hour _____ \$35.00

Subject to the maximum in each case set out below

First degree murder _____ 1,500.00
Second degree murder _____ 1,000.00
All others _____ 750.00

2. Counsel fee at preliminary inquiry -
per day _____ 175.00

3. Counsel fee at trial -
per day _____ 250.00

Junior Counsel in First Degree murder cases or
with the approval of the Director in Second
Degree Murder cases - per day _____ 100.00

Indictable Offences other than those within the exclusive
jurisdiction of the Supreme Court under Section 427 of the Criminal
Code (Canada) -

4. Preparation for preliminary hearing, where applicable,
and trial including interviews with the accused and witnesses -
per hour _____ 25.00

Subject to the maximum in each case set out below

Armed robbery, manslaughter, rape _____ 750.00
All other indictable offences _____ 500.00

5. Counsel fee at preliminary inquiry -
per day _____ 125.00

6. Counsel fee at trial in Supreme Court -
per day _____ 250.00

7. Counsel fee at trial before a County Court Judge
without a jury or before a Provincial Judge under Part XVI
of the Criminal Code (Canada) -
per day _____ 200.00

Application for Bail or Reduction of Bail on behalf of a person charged with any Indictable Offence -

8. Application to a Justice of the Supreme Court for all services incidental to the application, including drawing notice of motion, affidavits, attendances, justifications by surety or sureties or entering into recognizance _____ 150.00

9. When application for bail is made before a County Court Judge for the above services _____ 75.00

10. When application for bail is made before a Provincial Judge for the above services _____ 35.00

Adjournments -

11. Attendance on any necessary adjournment before a Justice of the Supreme Court _____ 35.00

12. Attendance on any necessary adjournment before a Justice of the Supreme Court _____ 35.00

13. Attendance on any necessary adjournment or adjournments before a Provincial Judge requested by the accused, in all _____ 35.00

Attendance on any adjournment before a Provincial Judge requested by the Crown _____ 35.00

(A Solicitor shall not be entitled to a fee for more than one adjournment before the same Provincial Judge obtained during the same half day, unless otherwise approved by the Executive Director)

Preventive Detention -

14. Preparation on an application under Part XXI of the Criminal Code (Canada) including interviews and other necessary services - per hour _____ 35.00

Subject to a maximum fee of \$750.00

15. Counsel fee on application - per day _____ 250.00

Appeals to the Appeal Division of the Supreme Court -

16. Drawing and filing Notice of Appeal and Preparation of Appeal Book _____ 100.00

17. Preparation, including Statement of Points of Law and Fact intended to be argued, where appeal is against sentence only _____ 125.00

18. Preparation, including Statement of Points of Law and Fact intended to be argued and including supplementary Notice of Appeal, where appeal is against conviction and sentence or conviction only _____ 250.00

19. Attendance to set down _____ 35.00
20. Counsel fee on appeal from conviction -
per day or portion thereof _____ 250.00
21. Counsel fee on appeal from sentence only -
per day or portion thereof _____ 150.00

Appeals to the Supreme Court of Canada in respect of all
Indictable Offences -

22. Application for Leave to Appeal including
preparation of the Notice of Motion, Statement
of Points of Law and Fact and the case and other
necessary proceedings _____ 200.00
23. Counsel Fee on application for Leave to Appeal _ 250.00
24. Application before the Chief Justice of Nova
Scotia or other Judge designated by him for
admission to bail including drawing of Notice
of Motion, Affidavits, attendances incidental
to the application, preparation of recognizances,
execution thereof and justification of surety or
sureties _____ 150.00
25. Drawing, filing and serving Notice of Appeal and
preparing case _____ 100.00
26. Preparation, including factum _____ 300.00
27. Counsel fee on appeal -
per day or portion thereof _____ 350.00

OTHER MATTERS

28. Counsel shall be allowed all reasonable and necessary
disbursements in full subject to being approved by
the Executive Director or a solicitor employed by the
Commission.
29. The Executive Director or such other person as he
shall designate may allow a fee to a solicitor for
the preparation of an opinion, for an additional
opinion or for his attendance to make further sub-
missions when requested by the Commission.
30. Except where the tariff item applicable to the services
is a block fee item covering fees for all services, an
allowance of \$25.00 per hour, to a maximum of six
hours per day may be made for the time spent in travelling
where the distance is fifteen miles or more one way,
and the solicitor satisfies the Executive Director that
such travel was reasonable and necessary under the
circumstances.

31. In any matter, proceeding, action or appeal, not dealt with by this Schedule of fees, the Executive Director shall allow a reasonable fee and in determining the fee properly payable in respect of such matter, proceeding, action or appeal, the Executive Director shall have regard to the Schedule of fees herein for comparable services.

This Schedule is a legal aid tariff reflecting fees customarily paid by a client of modest means and the fees provided for herein shall normally apply for the legal aid covered thereby, including block fees and maximum fees for preparation, provided that,

- (a) such fees may be increased by the Commission in those cases where in its opinion an increase is justified, having regard to all the circumstances including the nature of the offence charged, the complexity of the case and any other factor which would warrant an increased fee;
- (b) such fees may be decreased by the Commission in those cases where in its opinion a decrease is appropriate; and
- (c) where a solicitor represents two or more persons charged with the same or a similar offence arising out of the same occurrence, or where a solicitor represents a person charged with two or more offences, and in either case where the trials or pleas of guilty occur in the same court at approximately the same time, for the purposes of this Schedule, the solicitor shall be entitled to fees as for one client on one charge and such additional fees as may be approved as herein provided.

1010

EXECUTIVE COUNCIL



NOVA SCOTIA

Certified to be a true copy of an Order of his Honour the
Lieutenant Governor of Nova Scotia in Council made the

27th day of May A. D. 1982

N. S. Regulation 128/82

FILED

Date: May 31 1982

REGISTRAR OF REGULATION

82-675

The Governor in Council on the report and recommendation of the Attorney General dated the 18th day of May, A.D., 1982, on the recommendation of the Nova Scotia Legal Aid Commission, and pursuant to Section 26 of Chapter 11 of the Statutes of Nova Scotia, 1977, the Legal Aid Act, is pleased to make regulations in the form attached to and forming part of the report and recommendation as Appendix "A".

H. F. G. STEVENS, Q.C.,
CLERK OF THE EXECUTIVE COUNCIL.

REGULATIONS MADE BY THE GOVERNOR IN COUNCIL
PURSUANT TO SECTION 26 OF CHAPTER 11 OF
THE ACTS OF 1977, THE LEGAL AID ACT

1 Sections 1 and 2 of the Regulations made pursuant to Section 26 of Chapter 11 of the Acts of 1977, the Legal Aid Act, by Order in Council 77-954 are repealed and the following substituted therefore:

ELIGIBILITY

1 (1) Subject to the Act, an applicant is eligible to receive Civil Legal Aid and Criminal Legal Aid:

- (a) when an applicant qualifies for benefits under the Provincial Social Assistance Act, Part II, or benefits under the Family Benefits Act; or
- (b) when the obtaining of legal services outside of the legal aid plan would reduce the income of an applicant to a point whereby the applicant would qualify for benefits as per subsection 1(1)(a).

(2) A client who is eligible pursuant to subsection (1)(b) may be required by the Commission to make a contribution towards the payment of the costs of the legal services rendered on the applicant's behalf.

(3) An applicant shall not be required to dispose of his principal place of residence or assets necessary to maintain his livelihood.

2 Notwithstanding Section 1, where the income of an applicant for legal aid exceeds the amounts specified in Section 1, the applicant may be declared eligible for legal aid if the applicant cannot retain counsel at his own expense without him or his dependants, if any, suffering undue financial hardship such as incurring heavy indebtedness or being required to dispose of modest necessary assets.

Approved by the Lieutenant Governor
of Nova Scotia in Council on the

27th day of May 1952

CLERK OF THE EXECUTIVE COUNCIL

82-675

09-84-0260-01
704-2075 COMEX ST.
VANCOUVER, B.C. V6G 1S2.

February 12 1984.

Mr RON GIFFIN.
Attorney General of Nova Scotia.
Halifax. N. S.

Dear Sir:

Re: The Donald Marshall case.

I refer to the lack of compassion in this case and, to a precedent in Commonwealth law regarding compensation to person wrongfully charged, imprisoned and released.

This precedent involved Arthur Alan Thomas who was awarded about 1.3 million dollars about four or five years ago. The country = New Zealand. The case was to be known as the "CREWE MURDERS" which took place about twelve years prior to the imprisonment of Thomas.

If your department was aware, or now has any satisfied, of this - would you be good enough to make further investigations with the intention of some heavy compensation for Don Marshall?

Sincerely,
I. Mosley.

Acquittal puts justice on trial

DONALD MARSHALL Jr. sits uneasily on the conscience of Canadian justice, an unskilled, tormented Micmac Indian who served 11 years in prison for a murder he did not commit. Since his release he has become the abolitionist's ultimate argument. If the country can be fair to Mr. Marshall, it is possible to believe that it has the capacity to be fair to everyone. So far, it isn't even close.

The most publicized elements of the Donald Marshall story are his innocence in the 1971 death of a 16-year-old knifed in a scuffle in a

**JUNE
CALLWOOD**



Sydney, N. S., park; and the \$270,000 in compensation that an eminent judge from Prince Edward Island awarded him a few weeks ago for legal fees and the loss of his youth. What remains almost wholly unexamined is the process which put an innocent man in prison and the conduct of Sydney police and the Nova Scotia Attorney-General's department.

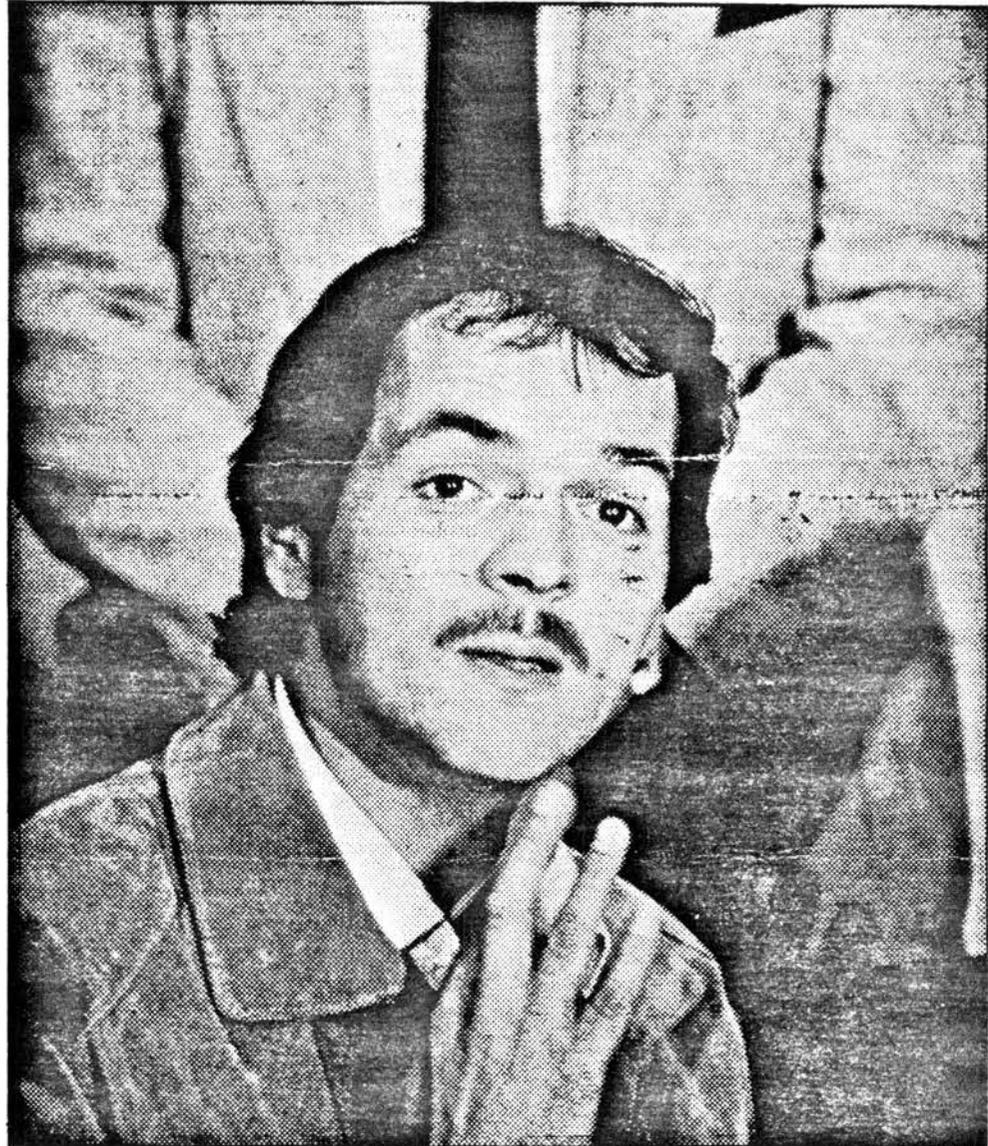
The most compelling evidence of questionable behavior by law-enforcement people comes in a report filed by Staff-Sgt. Harry Wheaton of the Royal Canadian Mounted Police. The officer, stationed in Halifax, led an investigation in 1982 into the circumstances surrounding the arrest and trial of Mr. Marshall. He discovered that key Crown witnesses, two 14-year-olds, were questioned for hours at a stretch by Sydney police until, said the report, they finally changed stories that exonerated the accused native into testimony that convicted him.

One of them, a woman by the time she was questioned in 1982, told the RCMP that "the police had me so scared . . . I felt pressured and agreed with things I should not have agreed with . . ."

The RCMP presented its report, highly critical of Sydney police, to Nova Scotia's Attorney-General's department, whose intervention prompted the RCMP to curtail the investigation. The report remained secret until last month when Kirby Grant, a Liberal candidate in Nova Scotia's provincial election, obtained a copy of it and held a press conference calling for a public inquiry. No such inquiry has been ordered.

Ten days after Mr. Marshall's conviction on Nov. 15, 1971, a man came forward to tell police the wrong person was going to prison and that he knew the identity of the real murderer. Although Mr. Marshall's case was being appealed, his lawyer said he was not notified by the Nova Scotia attorney-general of this new evidence. The appeal was accordingly lost and an innocent 17-year-old Donald Marshall was led away in shackles to serve 11 years in jail.

It was only because the RCMP — given new evidence by Mr. Marshall and his first lawyer, Stephen Aronson — started a new



Donald Marshall: no apologies forthcoming for 11 years spent in a penitentiary.

investigation and concluded the conviction was not substantiated by the evidence that he was released in March, 1982. A new trial was held and he was acquitted in May, 1983.

Roy Ebsary, who has been charged with the murder for which Donald Marshall served time, is currently facing a third trial. His first ended in a hung jury. A year ago he was found guilty of manslaughter, but the conviction was overturned after it was ruled the jury had been improperly instructed. A new trial has been ordered.

Donald Marshall's present lawyer, Felix Cacchione, a bearded 35-year-old who grew up in Montreal's tough east end, says that when he looks at what happened to his client he thinks: "There but for the grace of God go I." What he sees as needing to be addressed by all Canadians, not just those who live in Nova Scotia, is police power against those who appear to be insignificant and friendless. "What happened to Junior can happen to anyone," he says earnestly. "You can be walking along the street and suddenly you're scooped up."

The lawyer doesn't really mean that the police can put any Canadian behind bars. He does mean that if the law does not treat everyone equally, if justice is reserved for those with good wardrobes and education, the country might as well dispense with the courts and go straight from arrest to sentencing.

Many people in Nova Scotia are demanding an impartial investigation into what happened to Donald Marshall. They are distressed that there has not even been an apology from the police or the Nova Scotia Government. But Felix Cacchione doesn't want the inquiry to become another harsh examination of Mr. Marshall's character and broken life. There is some doubt that the young man, wracked as he is by nightmares and bouts of weeping, could tolerate more sessions in a witness box. Indeed, he should not be subjected to them.

It is not Mr. Marshall who is on trial, not any more. It is justice itself which must take the stand. And justice has a lot of explaining to do.

Globe and Mail

This Open Letter appeared in The Chronicle-Herald and Mail-Star on April 11th and April 15th, 1984 on Page 5.

AN OPEN LETTER TO PREMIER BUCHANAN

Donald Marshall spent eleven years in prison for a crime he didn't commit.

Eleven years.

Why?

And what can we do about it?

At last someone is doing something. The province has appointed Mr. Justice Alex Campbell of the Prince Edward Island Supreme Court to conduct an inquiry on compensation for Marshall.

But only on compensation.

We applaud the choice of a jurist like Alex Campbell and we are pleased by his proposal to make an interim payment of \$25,000.00 to Marshall. We welcome his promise to bring down recommendations by the end of the summer.

But that does not explain the whys.

Why Donald Marshall lost eleven years of his life.

Why we owe him compensation.

Many questions remain about the Marshall case.

Either the scope of Mr. Justice Alex Campbell's inquiry must be broadened, or another public inquiry must be launched into the circumstances surrounding the wrongful conviction and imprisonment of Donald Marshall.

Why do we need such an inquiry?

Because by knowing at last what really happened to Donald Marshall and why, we can try to stop it from ever happening again.

Arthur Andrew
Meredith Annett
George Bain
Kerstin Black
Lorraine Black
Harry Bruce
June Callwood
Anna Cameron
Lynne Carter
Mary Clancy, L.L.B.
Constance Cooke
Dr. and Mrs. J. McD. Corston
Barry Cowling
Ray Creery
Christine Currie
Donald E. Curren
James G. Eayres
Judith Fingard
Dr. Edgar Friedenberg
John Fryer
Professor Ruth Gamberg
Dr. John Godfrey
Senator John Godfrey
Ruth Goldbloom
Maxie Grant
Professor Les Haley
Gordon Hammond & Charlotte Hammond
Kenneth Harrington
Rt. Rev. L. F. Hatfield

Rev. G. Russell Hatton
G. P. Hebb
Kevin Keefe
Toni Laidlaw
Marilyn MacDonald
Sheilagh MacKenzie
Kenneth McGrattan
Dr. and Mrs. J. D. McLean
Frank Metzger
Sister Dorothy Moore, CSM
Dr. Donald Morris & Mora Morris
Nelly Novac
Heather Robertson, LL B
Dennis Ryan
George and Christina Shaw
Robbie Shaw
Mary Sparling
Walter Thompson, LL B
Nancy and Chris Wilcox
DALHOUSIE LAW FACULTY
Pattie Aller
Susan M. Ashley, LL B
Vaughan Black, LL B
B. L. Evans, LL B
Ian Townsend Gault, LL B
Wade McLaughlin, LL B
Faye Woodman, LL B
John A. Yogis, LL B
Dalhousie Law Students Society

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NOVA SCOTIANS FOR JUSTICE

Nova Scotia



Department of
Attorney General

PO Box 7
Halifax, Nova Scotia
B3J 2L6

Our File No. 09-84-0261-01

November 22, 1984

Mr. Frank E. Belliveau
9 Pictou Road
Apt. 12
Bible Hill
Truro, Nova Scotia
B2N 2R9

Dear Mr. Belliveau:

I wish to acknowledge your letter to the Attorney General of October 27, 1984.

I enclose a copy of your letter dated June 26, 1983 to the then Attorney General, Harry W. How, which touches upon the Donald Marshall case.

A review of our files does not disclose any additional correspondence forwarded by you concerning the case of Donald Marshall during the terms of office of either Attorney General Leonard Pace or Attorney General Harry How.

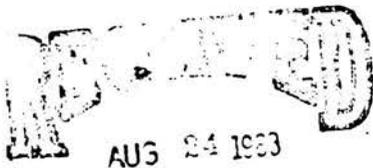
Yours very truly,

A handwritten signature in cursive script that reads "Martin E. Herschorn".

Martin E. Herschorn
Assistant Director (Criminal)

MEH:if
Encl.

To: The Attorney General
Hon. Harry How
P.O. Box 7
Halifax, NS



June 26th 1983

Hon. Sir:-

ATTORNEY GENERAL

In May 1977 I was sentenced to seven (7 years) and won a new trial on appeal and remained in custody, then in May 1978 I was resentenced to seven (6 years) I do believe that I am entitled to be released from prison with remission off my sentence, would your good office investigate as to "why" I am still in the Dorchester prison still serving my sentence, it could be due to the fact that I worked on the "Marshall Cove" the young Indian Chop "who" spent eleven years in prison, and the appellate court for the province of Nova Scotia proved the young man to be innocent, as you are aware the prison people, and the parole officials don't like me for my stand on "Human Rights" please come back to me in regards to these matters.

I remain
Frank L. Belliveau
Human Rights Associate
P.O. Box A-B
Dorchester, N.B.
Canada - E0A 1M0

To Martin
to handle
& reply to -

The Honourable
Mr. Ron Siffin
34 Broad Street
Sydney,
NS.

9 Pictou RD, APT-12
Bible Hill
Sydney, NS - B2N2R2

October 27, 1984

Honourable Sir:

Re: Donald Marshall;

The writer request for your office to forward to me all correspondence that I sent on behalf of Mr. Marshall "when"

(a) The Honourable Mr. Leonard Pace was attorney General.

(b) The Honourable Mr. Harry How was attorney General.

It was "i" who worked on the Marshall case for several years, and copies of documents should be in the Halifax office, and it would be appreciated "if" copies were sent to me at the above address

James Turky
Frank L. Belliveau

cc/file
JTB

... be held by invitation... and December in... and possibly Vancouver... the deadline for public comment... "established a basic framework, and we checked public comments... scale expansion and construction of... new facilities... development of the parks. The op... tions were made before receiving... development of the parks. The op... tions were made before receiving... development of the parks. The op...



Donald Marshall

decision

ose vote

ommons,

Kay says

The federal Cabinet has not discussed whether a free vote on it should be held in the House. Attorney-General Elmer MacKay

1982 RCMP probe of police conduct

Marshall inquiry blocked: report

By DEBORAH JONES
Special to The Globe and Mail

HALIFAX — The intervention of the Nova Scotia Attorney-General's Department prompted the RCMP to stop an investigation into conduct by the Sydney Police Department in the Donald Marshall case, a confidential 1982 RCMP report shows.

The document, released at a Halifax press conference yesterday by lawyer and Liberal Party candidate Kirby Grant, says the RCMP wanted to investigate allegations that Sydney police officers had forced three witnesses at the 1971 Marshall trial to lie during court testimony.

However, even though the RCMP had already determined that two of the witnesses lied during the trial, the Mounties were advised by officials within the Attorney-General's Department not to proceed with their investigation.

Mr. Marshall was convicted in 1971 of the second-degree murder of Sandy Seale and spent 11 years in prison for the crime before being acquitted after a new trial in May, 1983.

The 1982 RCMP report also says there was pressure on Crown witnesses during Mr. Marshall's trial to change their original statements to police.

Miss Grant, who is running against Attorney-General Ronald Giffin for the riding of Truro-Bible Hill in next month's provincial election, added her voice yesterday to widespread calls for a public inquiry into why Mr. Marshall was convicted and into the conduct of the Sydney police force.

While the Nova Scotia Government has not ruled out a public inquiry, Mr. Giffin has repeatedly said he will not discuss the issue until criminal proceedings against Roy Ebsary, who is facing his second trial for the Seale murder, have been dealt with by the courts.

The RCMP report was "given to me, and I can't say where I got it," Miss Grant said, adding that she released the report to the media "because I'm a lawyer as well as a candidate... and to me, there's been wrongdoing in the administration of justice."

In an interview with The Globe and Mail last night, Mr. Giffin said: "There was no attempt at any time to tell the RCMP to stop an investigation. ... That's just political nonsense."

"The immediate concern of the (Attorney-General's) Department at that point in time (May, 1982) was not to pursue side issues, but to deal with main issues."

Mr. Giffin said his department was seeking a new trial for Mr. Marshall at the time of the RCMP investigation of the Sydney police, and said the "side issues" included "people committing perjury, questions about the police conduct."

The photocopied report distributed by Miss Grant, signed by Inspector D. B. Scott of the Sydney subdivision of the RCMP, says in part: "It would appear from this investigation that our two eyewitnesses to the murder lied on the stand, and that the other main witness, (Patricia) Harris, lied as well, under pressure from the Sydney city police."

Another part of the RCMP report, signed by Staff Sergeant H. F. Wheaton, notes: "Discussions were held with Crown prosecutor Frank C. Edwards in regards to interviewing Chief (J. F.) McIntyre and Inspector W. A. Urquhart in regards to the allegations (of three witnesses) that they were induced to fabricate evidence in the original trial in this matter."

"Mr. Edwards has advised me that he further discussed the matter with Gordon Gale of the Attorney-General's Department and it was felt that these interviews should be held in abeyance for the present. The file will be held open pending further instructions."

Miss Grant told reporters yesterday that "what happened to Donald Marshall is the result of the mishandling of the administration of justice in this province. Surely it is the duty of the Attorney-General's Department to take action when they are apprised of a situation inundated with serious allegations and apparent omissions."

"The crux of this issue is that this Government has not been prepared to look farther into this matter and, worse, they have instructed the RCMP investigators not to delve further into what occurred in the original police investigation."

Mr. Marshall's lawyer, Felix Cacchione, said in an interview yesterday that he had previously seen the report released by Miss Grant, but is still waiting to see a further RCMP report. Mr. Cacchione said the other report makes recommendations to the Attorney-General's Department.

Hees supp further stu on radiati

OTTAWA (CP) — A study for the Government shows that among members of the army exposed to low-level nuclear radiation in the 1950s is "quite similar" to people not exposed to radiation.

Further research, however, is to determine whether the radiation sure increased the incidence and other diseases among veterans living. Mr. Hees said yesterday. The mortality study, conducted by the University of Ottawa scientists department, found the rate of cancer among the exposed army personnel was slightly lower than comparison groups.

The research only studied people who have died, and ignored disease among living people who had been exposed to radiation, the scientists out.

"What came out of this study is a very simple fact, that the higher death rate in the group that has been subjected to radiation than the group that had not been subjected to radiation," Mr. Hees said.

He said he has sent a Minister Jake Epp, asking that a department study the rate of disease, especially cancer, among living veterans who were exposed to radiation.

"The next thing is to find out who has been subjected to radiation in the chance of being afflicted by various forms of illness," he said.

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ROYAL HUDSON AT CHATHAM
By Wentworth D. Folkins

The 1985

ag



KIRBY GRANT, the Liberal trying to unseat Attorney General Ron Giffin, charged yesterday that the wrongful conviction of Donald Marshall is one example of "political considerations" interfering with the administration of justice in Nova Scotia. Giffin denied the charge. (Moran)

Giffin, How deny halting Marshall probe

by FRANCIS MORAN
The provincial attorney general's department has been accused of bringing "political considerations" to bear by halting a 1982 RCMP investigation into allegations that the Sydney police department forced witnesses to lie at the 1971 murder trial that wrongfully sent Donald Marshall to jail.

Marshall case is "one example of how the administration of justice is not being properly handled" and she criticized the Buchanan government for their "disturbing" attitude towards it.

The government denied the charge. Kirby Grant, a Truro lawyer trying to unseat Attorney-General Ron Giffin, told a press conference yesterday that Gordon Gale, the AG's director of prosecutions, ordered the RCMP not to interview two Sydney police officers about charges they forced witnesses to lie.

But both Giffin and county court judge Harry How, who was attorney general in 1982, denied the charges of political interference and said the RCMP were hauled off the investigation so they could concentrate on gathering the evidence needed to clear Marshall.

probe

MacIntyre, now chief of police in Sydney, and Insp. William Urquhart pressured the critical witnesses to lie.

underline 'totally, without foundation.'

Priority
In fact, How said, his department asked the RCMP to conduct the 1982 investigation into the question of Marshall's guilt after it became a public issue. He added that the purpose of the investigation was to clear Marshall, if he deserved it, and that took priority over any other aspect of the investigation.

Grant also called for a full inquiry into the circumstances that saw Marshall wrongfully convicted in the first place, something the government has consistently refused to do because, they say, they do not want to influence a retrial for Roy Ebsary, who has been charged with manslaughter in connection with Seale's death.



Donald Marshall

Marshall won't come out against noose

Disturbing
Grant said the

OTTAWA (UPC) — Donald Marshall, who

spent 11 years in prison for a murder he did not commit, refused Thursday to take a stand on the death penalty.

opened. Marshall recently received \$270,000 compensation from the Nova Scotia government for the years he spent in jail.

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"It's up to the people of Canada, it's not up to me," Marshall told a packed news conference. "It depends on the circumstances. I don't think I can go on either side."

Before the death penalty was abolished in 1972, only first-degree murder was punishable by capital punishment. First-degree murder was limited to the killing of prison guards or police officers but that was later eliminated.

Marshall's case has often been cited by abolitionists as proving the possibility for error in the judicial system that could lead to execution of an innocent person.

During the news conference, Marshall was nervous and often appeared confused by the barrage of questions from reporters and replied hesitantly in a low voice.

Marshall, 31, was brought to Ottawa from Nova Scotia to speak on the issue by the Canadian Office of Human Rights, an independent prisoners' rights group based in Hull, Que.

Marshall said he would not vote if a referendum was held on capital punishment. He said if capital punishment were brought back, it should apply to all murder convictions, and not just those who kill police officers.

Group spokesmen said they were not surprised by his ambivalent stand. However, a press release prepared for the news conference said Marshall "arrived in Ottawa by airplane this morning to protest against capital punishment."

Marshall did hedge on his view of life sentences and prison conditions. "I'd sooner be dead than go back to where I came from," he said.

Marshall was convicted of second-degree murder in Sydney, N.S., in 1971 in the slaying of a teenager. He was acquitted in 1983 after the trial was re-

He added that he knew a number of prisoners serving life sentences who would prefer to die than spend more time in jail.

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AG Koury

Marshall report 'implicates' department

By BILL POWER
Staff Reporter

Liberal candidate Kirby Grant released details of a confidential RCMP report on the Donald Marshall case Thursday and called for a complete investigation of the judicial "bungling" which led to the Micmac Indian's 11-year imprisonment for a murder he did not commit.

The 30-year-old Truro lawyer, a political newcomer endeavoring to shake Attorney-General Ron Giffin's firm grip on the Truro-Bible Hill constituency, said contents of the 1982 RCMP report into the Marshall case clearly implicate the attorney-general's department in what constitutes "a serious miscarriage" of justice.

"I am concerned about the proper administration of justice in Nova Scotia and I believe that this case is one example of how the administration of justice is not being properly handled (here)," she said.

Among other things, the report indicates investigating RCMP officers discovered Crown witnesses were pressured by police to change original statements and that files from the original 1971 murder investigation are incomplete.

Ms. Grant claimed the attorney-general's department deliberately stifled the RCMP probe by requesting the investigating officers to discontinue interviews with witnesses who testified at the original trial.

"The crux of this issue is that this government has not been prepared to look further into this matter, and worse, they have instructed the RCMP investigators not to delve further into what occurred in the original police investigation," she said.

However, Mr. Giffin has suggested his Liberal opponent in Truro-Bible Hill has only the Nov. 6 provincial election in mind by releasing the officially "uncompleted" finding of the RCMP probe in the midst of the campaign.

Contacted late Thursday, he said his department never at any time endeavored to impede the RCMP probe. "In fact, it was just the opposite. We encouraged it and co-operated fully."

Moreover, he said the possibility of a complete public inquiry into the case has not been ruled out by his department, "but any decision in this regard has been delayed until the related court proceedings wrap up."

Ms. Grant contended the department should have demonstrated greater concern when investigating RCMP heard allegations that 14-year-old witnesses were pressured by police to change their statements.

"Surely it is the duty of the attorney-general's department to take action when they are apprised of a situation (that is)

inundated with serious allegations and apparent omissions."

She asked why the department had not demonstrated greater concern about the apparent incompleteness of the original police report.

Irregularities with the case extend right back to 1971 and should have been reviewed at the time, she said.

Quoting a memorandum prepared by the investigating RCMP, she noted the 1982 probe was hampered due to a general lack of information and procedural irregularities in the original murder investigation headed up by Sydney Police Department.

The memorandum indicates some standard police reports were not prepared, that there was no autopsy performed on the deceased, and that there were no photographs taken during the investigation.

The investigators determined the standard police "lineup" was arranged, but were unable to determine who was in the lineup or who viewed it.

The Truro lawyer suggested "political expedience" prompted the attorney-general's department to stop the investigation when the RCMP heard allegations by some Crown witnesses that they had been pressured to change their testimony, testimony that led to the conviction and subsequent imprisonment of Marshall.

~~09-82-0236-00~~

September 7, 1983

Mrs. Noreen Provost
4058 St. Georges Ave.
NORTH VANCOUVER
British Columbia
V7N 1W8

Dear Mrs. Provost:

My sincere apologies for not replying sooner to your letter of May 15th which reached my office on May 24th. It came during the closing week of the Provincial Legislature when I was very much involved in the wrap-up of our legislative program. In addition, during the session, I got somewhat behind in my personal correspondence and am just now getting to many of the letters which came in in the latter part of May.

I very much share your view that we have not given enough attention to the victims of crime. Since taking office in 1978, I have had the satisfaction of proclaiming legislation providing for compensation to victims of crime in this Province which the former Government had enacted some three years before we took over but never implemented. It does not provide all of the compensation that I would like, but at least is a very significant beginning and all we can do at the moment within the resources at our disposal.

With respect to the Marshall case, you will understand that most of the media, in their simplistic approach, portray Mr. Marshall as a victim of injustice. In fact, our Supreme Court, Appeal Division, in reviewing his case and hearing evidence from witnesses who reversed their evidence that they had testified eleven years ago, came to the conclusion that there was now such a doubt of the whole of the evidence that no jury would convict in the event of a retrial. The Court therefore felt obliged to find Mr. Marshall not guilty. This should not be

interpreted as finding him innocent and indeed the Court took pains to point out that had he been truthful in the original trial and to the police before the trial, his original conviction might not have happened. The Court took pains to say how unsatisfactory his evidence was even before the Appeal Division.

One of the penalties in public life is the target you are for public criticism. Much of this comes from biased individuals who use the politician as a focus of their hostility or rage. That is why it is so refreshing to receive a letter, such as yours, from a person who tries to see both sides of a question and be restrained in their comments. I appreciate therefore receiving letters such as yours and I wish you the best in your personal endeavours and as a member of Citizens United for Safety and Justice.

Very sincerely,

Harry W. How, Q.C.



Nova Scotia

**Department of
Attorney General**

Office of the Minister

PO Box 7
Halifax, Nova Scotia
B3J 2L6

902 424-4044
902 424-4020

File Number 09-84-0257-1

August 29, 1983

Miss Ruth Cordy
28 - 1545 Oxford St.
HALIFAX, Nova Scotia
B3H 3Z3

Dear Miss Cordy:

I appreciate your letter, of July 26th, with respect to Donald Marshall.

I would remind you that the Appeal Division was critical of Mr. Marshall stating that he was untruthful before them and before the trial court in 1971. As a result the five judges of our Appeal Division considered that Mr. Marshall was, in large part, the author of his own imprisonment and that if he had been truthful with the police and the court before and at his original trial, that he may well have established his innocence of the murder charge at that time.

One has to remember as well that Mr. Seale and Mr. Marshall were both in the park at Sydney on the night of the murder and planned to rob somebody and indeed were in the course of robbing Ebsary when he allegedly struck at both Seale and Marshall with a knife and in the case of Seale, this proved fatal. I may add that I have made it publicly clear that despite this if Mr. Marshall or someone on his behalf makes a formal claim for compensation it will be given sympathetic consideration by me and the Department.

Yours sincerely,

Harry W. How, Q. C.



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Yours sincerely,

Harry W. How, Q. C.



ONTARIO

**ROYAL COMMISSION
INQUIRY INTO CIVIL RIGHTS**

REPORT NUMBER ONE

VOLUME 2

1968

RECOMMENDATIONS

1. No changes should be made in the law concerning privileged communications.¹⁷
2. Section 143 of the Highway Traffic Act¹⁸ should be repealed.
3. Any compulsion to make statements imposed on those involved in highway traffic accidents should go no further than to require them to report the accident and give the names of persons involved and known witnesses, together with a statement of injury sustained, if any.
4. All other statements concerning the accident should be on a voluntary basis, open to inspection and admissible in any proceedings according to the relevant laws of evidence.
5. The names of witnesses and statements made by them should likewise be open to inspection, and there should be no special statutory restraint on their admissibility in evidence in any proceedings.

¹⁷The British Law Reform Committee came to the conclusion that, with the exception of limited privilege for patent agents, no further statutory privileges should be created in respect of other confidential relationships. Report of the Law Reform Committee (1967), *Comm. 3472*.

¹⁸R.S.O. 1960, c. 172.

CHAPTER 54

Reimbursement of Innocent Persons Suffering Wrongful Convictions

THE only statutory provisions which offer any form of redress to a person who is charged with a crime and who is subsequently found to be not guilty, are in the form of certain limited costs which may be awarded to him in provincial and federal summary conviction cases or in the case of proceedings by indictment for defamatory libel.

Under both the Summary Convictions Act¹ and the Criminal Code, the summary conviction court may, on dismissing an informant, order the informant to pay reasonable costs to the defendant, which are not inconsistent with the schedule of fees in respect of items set out under section 744 of the Criminal Code.² In respect of provincial summary conviction offences, the costs awarded to the defendant at trial may include a counsel fee of not more than \$10.³

On appeal to the county or district court by way of trial *de novo*, the court is empowered to award reasonable costs to the defendant, including, in respect of provincial summary conviction offences, counsel fees and all necessary disbursements.⁴ In the event of further appeal to the Court of Appeal,

¹R.S.O. 1960, c. 387.

²Summary Convictions Act, R.S.O. 1960, c. 387, s. 9(2); *Crim. Code*, s. 716(1)(b).

³Summary Convictions Act, R.S.O. 1960, c. 387, s. 9(5).

⁴*Ibid.*, s. 17(4); *Crim. Code*, s. 730.

the court may make any order with respect to costs which it considers proper.⁸

Other than the foregoing and in cases of defamatory libel, no costs may be awarded either for or against a defendant in respect of trials or appeals in criminal cases.

But costs awarded in the discretion of the court do not constitute compensation or reimbursement to an accused person who is found to be innocent. Even the costs that may be allowed under the Summary Convictions Act, or Part XXIV of the Criminal Code, do not reflect the actual costs which may be incurred by an accused person in successfully defending himself. He is never entitled to costs against the Crown, and even when he is awarded costs against a private prosecutor they are inadequate. The \$10 counsel fee, which is the maximum stipulated by the Act, and the statutory tariff of scheduled items bear little relation to the financial outlay of the accused. Although on appeal by way of trial *de novo* the judge is empowered to make an order as to costs which he considers "just and reasonable", in practice the usual order is \$25 plus disbursements.⁹

Whatever may be said about the inadequacy of costs, the question remains: Should an innocent person receive compensation for being wrongfully convicted, and particularly if he suffers imprisonment as a result of a wrongful conviction?

There is presently no statutory scheme in Ontario similar to the schemes of many European countries, and those adopted federally and in many of the states of the United States. Denmark enacted compensation legislation as early as 1886, and Norway and Sweden passed similar legislation in 1887 and 1888 respectively. The United States enacted legislation in 1940. Individual states which have compensation legislation are New York, California, Illinois and Wisconsin. North Dakota had a scheme, modelled on the Wisconsin statute, but repealed it in 1965. In addition, Massachusetts has legislation awarding compensation for overlong detention before trial and acquittal.

⁸Crim. Code, s. 743(9).

⁹On appeals under the Summary Convictions Act, R.S.O. 1960, c. 387, s. 17(4), a judge hearing the appeal may award "reasonable costs . . . including counsel fees and all necessary disbursements."

As is the case with respect to compensation for victims of crime,⁷ an accused or convicted person who has been proved to be innocent has little hope of obtaining redress by any civil remedy. Three relevant causes of action lie: actions for false arrest, false imprisonment and malicious prosecution. But these causes of action are hedged about with so many safeguards that it is only in rare cases that one who has been arrested, charged with a crime and convicted, can succeed in recovering damages. The onus is on the plaintiff to prove want of reasonable and probable cause or to prove malice or both. This onus is usually insurmountable.

Two principal arguments are usually advanced to support compensation for innocent persons who have been prosecuted or convicted for crimes:

(1) The right to compensation is analogous to that where private property has been expropriated. In such cases it is conceded that the owner is entitled to a reasonable compensation for his loss. In the case of wrongful conviction and imprisonment, the innocent person is deprived of his liberty and should be compensated for his loss of income and the cost of defending himself. The public interest involves the need to enforce the criminal law and the enforcement entails occasional errors, resulting in the punishment of innocent persons.

(2) The problem is analogous to that raised in industrial insurance. In the administration of the criminal law there are bound to be unavoidable accidents, and just as we have a scheme to compensate workmen who have been injured in the operation of industry, there should be a scheme to compensate the injured where accidents occur in the enforcement of law. It is contended that the costs of such accidents should fall on the whole community which benefits from the administration of the criminal law, rather than on the individuals suffering as a result of the accident.⁸

In the jurisdictions providing for compensation in the case of errors in the administration of criminal justice, the

⁷See Chapter 35 *infra*.

⁸See Borchard, *State Indemnity for Errors of Criminal Justice*, 21 Boston U. L. Rev. 201 (1942).

legislation varies widely. In the United States, and in those individual states which have dealt with the matter, compensation, within statutory limits, is awarded only to those who have been wrongfully convicted and imprisoned. At the other extreme, in the Scandinavian countries legislation makes provision for compensation for any material loss that may ensue from a charge or prosecution against an innocent person, whether or not a conviction results or imprisonment or detention is a consequence.

In Norway (in Denmark and Sweden the law is virtually identical) the Criminal Procedure Act of 1887 provides for compensation in three situations:⁹

(1) Compensation may be awarded where the accused has suffered a "material loss" through a prosecution *per se*; that is, simply and solely because he has been wrongfully accused of a crime.

Under this heading he may, in the discretion of the court, recover compensation, even though the charge may be dropped or he is acquitted at trial. Compensation has been awarded under this heading, even where an accused has been acquitted on grounds of insufficiency of evidence, notwithstanding that he is suspect and may in fact be guilty.

(2) Compensation may be awarded for any detention that an accused may undergo following a remand into custody.

This heading of compensation does not apply to an arrest itself or to detention consequent upon arrest and prior to remand. Thus, if a person is released without being remanded into custody, he is not entitled to compensation under this heading. He may, however, receive compensation in respect of any material loss which he may have suffered under the first heading.

If he is remanded into custody and the charge is later dropped or the accused is acquitted, he has, under this heading, an unconditional claim for compensation, provided only that he shows that it is "unlikely" that he committed the crime charged.

⁹Bratholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 190 U. Pa. L. Rev. 833 (1961).

(3) If an accused has been actually convicted and has suffered a penalty as a result (not necessarily imprisonment) and he is later found not guilty of the crime for which the penalty was imposed, he apparently has an automatic right to compensation, even though grounds for suspicion of complicity may still exist.

This specific heading only covers the period for which punishment was imposed—that is, after sentence—but any prior detention or any material loss suffered as a consequence of the prosecution or charge may, in proper cases, be recovered under the other headings.

The statute does, however, provide for an overriding safeguard against abuse by stipulating that, in all cases, a condition precedent to compensation is that an accused, even though he may be innocent, shall not by any fault of his own cause a prosecution to be brought against him, or by his own fault have been responsible for any detention in custody. Thus, making a false confession or seeking to escape or seeming to tamper or influence witnesses, will all constitute absolute bars to compensation.

The Scandinavian schemes are administered by the courts themselves. This leads to some invidious consequences, such as two types of verdicts of acquittal. Thus, the court may acquit an accused at trial but, in its discretion, refuse to award compensation. The verdict of acquittal therefore carries a stigma, which would not be the case if compensation were granted in addition. Of necessity, too, there must be a re-investigation of all the evidence, in the case of appeals, both from the point of view of the legality of a conviction, and as to whether compensation can or should be awarded.

The rules, conditions and procedures which have been adopted in the United States are more realistic than the Scandinavian schemes.¹⁰ Since 1911, Massachusetts has made pro-

¹⁰The following schemes and legislation have been considered—United States: Unjust Conviction and Imprisonment Statute, 28 U.S.C., ss. 1495, 2513 (1940). New York: Court of Claims Act, s. 9(3a), McKinney Con. Laws of N.Y., Book 29A, Part 2. California: Cal. Penal Code, ss. 4900-06 (1913). Illinois: Illinois Annual Statutes, c. 37, s. 4378(c), (Smith-Hurd Supp. 1960). Wisconsin: Wis. Stat. Title 27 (1957), s. 285.05 (1913). North Dakota: North Dakota Century Code, c. 12-57 (enacted in 1917 but repealed in 1965).

vision for compensation to persons kept in confinement for more than six months awaiting trial, where they are eventually acquitted or discharged, if the delay in trial was not at their request or with their consent.¹¹

Any law providing for compensation for persons prosecuted for crimes and found not guilty must provide safeguards against its abuse.

The schemes that are in effect in other countries must be considered in the light of constitutional realities in Canada. The criminal law and criminal procedure are subjects over which the Parliament of Canada has exclusive legislative power,¹² while the civil right to compensation for wrongful prosecution or imprisonment is a subject over which the legislature of the province in question has exclusive legislative power.¹³

The problem is further complicated by the fact that under our system a verdict of acquittal, whether rendered by the court of first instance or by a court of appeal, is not a judgment declaring the accused innocent. In a criminal trial the accused is presumed to be innocent. That presumption may be rebutted only by proper evidence that establishes guilt beyond a reasonable doubt. The verdict of not guilty merely establishes that the onus imposed by law has not been met.

In the American jurisdictions, compensation may only be awarded if the accused is both convicted and imprisoned for an offence which he did not commit. This last condition does not mean the same thing as an offence for which he is eventually acquitted, or in respect of which his conviction is quashed or set aside. On applications for compensation the onus is upon the applicant to show that he was innocent in fact; i.e., either that the crime with which he was charged was not committed at all, or, if committed, was not committed by him. Under the various American schemes, this must be evidenced by a pardon of the Governor granted upon the stated ground of innocence, or by a certificate of the court rendering the verdict of acquittal, stating that the accused

was innocent in fact as well as in law. Alternatively, in certain states, e.g., California, the claimant may establish his claim by proof before a special court or tribunal.

In addition, under the American scheme, it is a condition to a successful application that the accused show that he did not, by any act or omission on his part, either intentionally or negligently contribute to the events which brought about his arrest or conviction. This the applicant must establish either by proof before the tribunal authorized to award compensation, or in some cases by the production of a certificate of the court rendering the verdict of acquittal.

Except in New York State, an upper limit is placed upon the amount that may be awarded. Under the Federal Act it is \$5,000; under the Wisconsin statute, not more than \$1,500 for each year of imprisonment, with an aggregate not exceeding \$5,000; in North Dakota the respective limits were \$1,500 and \$2,000 under its former legislation; in California, \$5,000; in Illinois "... the court shall make no award in excess of the following amounts. For imprisonment of 5 years or less, not more than \$15,000; for imprisonment of 14 years or less but over 5 years, not more than \$30,000; for imprisonment of over 14 years, not more than \$35,000; and provided further the court shall fix attorney fees not to exceed 25 percent of the award granted".

The Federal statute, the Unjust Conviction and Imprisonment Act,¹⁴ is representative of the type of scheme which has been followed, but not precisely, where legislation has been adopted in the United States. The claims are heard by the United States Court of Claims, which is a special court vested with jurisdiction to entertain claims against the United States.¹⁵ A claimant must allege and prove that:

- (a) (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted . . . as it appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction, and

¹¹See *General Laws of Massachusetts*, 1921, c. 277, s. 73.

¹²*B.N.A. Act*, s. 91(27).

¹³*Ibid.*, s. 92(13).

¹⁴28 U.S.C., ss. 1495, 2513 (1940).

¹⁵*Ibid.*, s. 1495.

- (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.
- (b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.
- (c) No pardon or certified copy of a pardon shall be considered by the Court of Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.
- (d) The Court may permit the plaintiff to prosecute such action in *forma pauperis*.
- (e) The amount of damages awarded shall not exceed the sum of \$5,000.¹⁶

The jurisprudence under the Federal statute indicates that these conditions of compensation are strictly construed. A reversal of a conviction on grounds of insufficiency of evidence does not, therefore, entitle the claimant to compensation because it does not prove that he did not commit any of the acts of which he was charged.¹⁷

The administration of the Wisconsin and California schemes, which were introduced as early as 1913, differs somewhat from the Federal scheme (and from the New York scheme which also designates its Court of Claims as the court to entertain applications for compensation). In these states, administrative boards are constituted to hear the applications. These boards do not sit in review of the decisions of the courts confirming or reversing the convictions in question. Only evidence or circumstances discovered or arising after the conviction are open for consideration. In Wisconsin the onus is specifically laid on the accused to prove his innocence "beyond a reasonable doubt". Likewise the claimant must

prove that he did not by his act or failure to act contribute to or bring about the conviction and imprisonment for which he seeks compensation. The North Dakota scheme, enacted in 1917 and repealed in 1965, was the same as the Wisconsin scheme. The final decision is not, as in Scandinavia, left to the court or courts originally involved in the case, nor are their decisions as such open to review or reevaluation by the court or board entertaining applications for compensation. The American schemes have been designed to eliminate defects in the Scandinavian schemes.

The fact that so many jurisdictions in Europe and in the United States have passed legislation providing for compensation for innocent persons who have been accused of crime would indicate that there is need for some remedial legislation. The solutions of the problem that have been adopted in other countries do not indicate that they have imposed any heavy financial burdens on the state. Compensation seems to have been confined to the most flagrant instances of injustice.

When one has regard for the total number of convictions and acquittals in the United States, it would appear that the American schemes are so seldom employed that the efficacy of such schemes is considerably exaggerated. There have been no recoveries under the Federal statute of the United States in recent years. There was an award in the maximum amount of \$5,000 in 1954, and another in the amount of \$4,000 in 1955. At the time of writing this would appear to be the last case in which compensation was awarded.

The North Dakota scheme was never used from its enactment in 1917 to its repeal in 1965. Under the Wisconsin scheme, no compensation has been paid out since its enactment in 1913. Nothing has been paid out under the statutory scheme of New York, although the Attorney General of that state advises us that there have been cases where compensation has been paid under the authority of special legislation enacted by the legislature.

No awards have been made under the Illinois statute, but we were advised that several cases are now under consideration. There have been numerous instances in which

¹⁶*Ibid.*, s. 2513.

¹⁷*U.S. v. Keegan*, 71 F. Supp. 623 (1947).

the legislature made awards to persons wrongfully imprisoned, but no figures relative to the amounts are available.

In California, in three of the last five years, no awards were made. In 1962 an award of \$5,000 was made, and in 1965 four awards were made, amounting to \$5,000, \$2,640, \$5,000 and \$5,000 respectively.

In Norway, where grounds for compensation are much broader, and where acquittal rather than innocence is often all that it is necessary to prove, the amount paid out in compensation is small. Over the five-year period from 1956 to 1961, only thirty-five persons were awarded compensation, and the total amount paid was the equivalent of \$45,000, or an average of \$1,300 for each claimant.¹⁸

Constitutional problems, to which we have referred, present real difficulties in establishing in Ontario any scheme patterned on those in effect in the United States and the Scandinavian countries.

In Canada, civil procedure could not be integrated with the criminal procedure, even if it should be considered desirable. The Federal Government defines the procedure to be followed in the criminal courts. It might well be that the Province could provide by appropriate legislation that a right to compensation should flow from a verdict of acquittal; but legislation providing for a second verdict or certificate that the court is satisfied that the accused is innocent—as distinct from the verdict “not guilty”—would engraft a civil procedure on to the criminal procedure which, in our view, would be beyond the power of the Legislature and undesirable. The Federal Government has prescribed the procedure to be followed in criminal cases. The Province cannot involve it in any procedure to establish civil liability.

Even if the Legislature had power to provide for a verdict of innocent or for a certificate of innocence to be issued by the court trying the case, the exercise of the power would create chaos in criminal trials. A two-pronged trial would have to be conducted: one prong pointing to a verdict of acquittal, and another to a certificate or verdict of innocence

¹⁸Braholm, *Compensation of Persons Wrongfully Accused or Convicted in Norway*, 109 U. Pa. L. Rev. 833, 839 (1961).

for the purpose of founding a claim for damages. The onus of proof on the first branch would be on the Crown to establish guilt beyond a reasonable doubt. On the second branch, the onus would be on the accused to establish his innocence, either on a preponderance of evidence or beyond a reasonable doubt.

Another formidable objection to the introduction into a criminal trial of any other issue than the issues of guilty or not guilty according to law, is that there would in fact be three verdicts possible:

- (1) Guilty;
- (2) Not guilty without compensation; and
- (3) Not guilty with a certificate for compensation.

Wherever an accused has failed to get a certificate on which to base a claim for compensation, he is left with a blight on his character, notwithstanding that he has been found not guilty. It could be said of him that the court found that his guilt had not been established beyond a reasonable doubt, but it was not convinced that he was innocent.

The alternative to the adoption of the Scandinavian scheme, or the Federal scheme of the United States, would be to establish a board of claims to which applicants might apply for compensation. For reasons given elsewhere in this Report, we do not think that such a board should be set up. If the right to compensation for wrongful prosecution, conviction or imprisonment is to be conferred, matters for judicial decision are raised of a character that should be decided in the courts. If trials of such matters cannot be disposed of in the courts, it is undesirable that administrative tribunals should be put in the position of reviewing the decisions of the courts.

The question remains: What procedure should be provided to compensate individuals who have been imprisoned through manifest error in the administration of justice? The answer to this question should be prefaced by a statement that all steps possible should be taken to see that manifest error does not occur. Adequate safeguards to prevent unnecessary imprisonment pending trial, an adequate legal aid system both at trial and on appeal, and a proper climate in

which to conduct criminal trials would all do much to reduce the incidence of error in the administration of justice. Where there is manifest error, provision should be made for compensation.

RECOMMENDATION

We recommend that statutory authority be conferred on the Lieutenant Governor in Council to make *ex gratia* payments on the recommendation of an *ad hoc* tribunal, consisting of judges of the Supreme Court of Ontario appointed from time to time to consider cases where it is claimed that a person has been imprisoned and that his innocence can be clearly established.

The few awards in those jurisdictions where compensation schemes have been in force for many years would indicate that any elaborate procedure which would tend to create confusion in the administration of justice is not warranted. Real injury to civil rights could result from the introduction into criminal procedure of any element of a civil claim for compensation.

CHAPTER 55

Compensation for Victims of Crime

The subject of the compensation for victims of crime is divisible into two parts:

1. Compensation by the State for persons who have suffered injury as a result of the commission of crime;
2. Compensation by the State for those who have sustained injury or loss while engaged in law enforcement.

The idea of compensating victims of crime is not new. The penal codes of Babylon, Israel, Greece and Rome all required the criminal to compensate his victim with property or money. Compensable offences ranged from robbery and burglary to libel, slander, assault and murder. Compensation reached its zenith in Anglo-Saxon England during the seventh century. As the years progressed, kings eager to extend their authority, and with an eye on revenue, entered the field by imposing fines and imprisonment. A system of criminal law and criminal procedure developed, but it did not entirely extinguish the older system of personal feud. With the absorption of the concept of sin and penance into the penal law, punishment gradually replaced compensation as an expiation for crime, leaving to the victim of crime a remedy that, more often than not, is useless, that is, the right to proceed against the aggressor in a civil action.

The assumption that claims of the victim are sufficiently satisfied if the offender is punished by society becomes less

**INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

**REPORT OF CANADA
on Implementation of the Provisions of the Covenant**

March 1979



**Secretary
of State**

**Secrétariat
d'État**

right to personal security and inviolability. Section 4 affirms that "Every person has a right to the safeguard of his dignity, honour or reputation". Section 25 states that "Every person arrested or detained must be treated with humanity and with the respect due to the human person".

Section 19 of the Civil Code reaffirms the inviolability of the human person and adds that "No one may cause harm to the person of another without his consent or without being authorized by the law to do so".

Finally, under section 20 of the Police Act, the Police Commission may "make an inquiry respecting the Police Force or any municipal police force and as to the conduct of any member of the Police Force, municipal policeman or special constable, of its own motion or whenever a citizen requests it to do so in writing and gives it sufficient reasons to support his request".

Article 9

Québec law fulfills the requirements of paragraphs 1 - 5 of article 9 of the Covenant. Paragraph 5 is interpreted to mean that recourse must be provided for the victim of

illegal arrest or detention, to enable him to establish his right to compensation. Such recourse is available under Québec civil, disciplinary and penal law.²

Article 10

The rights recognized in paragraphs 1 and 2 are protected by ss. 25, 26 and 27 of the Charter of Human Rights and Freedoms:

- "25. Every person arrested or detained must be treated with humanity and with the respect due to the human person.
- 26. Every person confined to a house of detention has the right to separate treatment appropriate to his sex, his age and his physical or mental condition.
- 27. Every person confined to a house of detention while awaiting the outcome of his trial has the right to be kept apart, until final judgment, from prisoners serving sentence."

Similarly, s. 17 of the Probation and Houses of Detention Act (SQ 1969, c. 21 as amended by the 1978 statutes, Bill 85) states that:

"Every house of detention shall be equipped in such a way that the persons who are there pending the conclusion of their trial are kept separate from those who are serving sentences there."

2. See also the comments on article 7 above.

Compensation for Marshall interesting legal question

By JIM VIBERT
Staff Reporter

The acquittal of Donald Marshall Tuesday on a murder charge for which he served 11 years in prison presents some interesting and new legal considerations for the provincial attorney general's department.

Attorney-General Harry How said in an interview Tuesday the question of compensation being paid to Mr. Marshall for the 11-year loss of freedom will be a totally new experience for the Nova Scotia justice community.

Mr. How said in order for compensation to be considered an application for compensation would have to be made by the complainant.

And from that point on, Mr. How said, any action taken would be "totally new, a fresh start, legally so to speak, in Nova Scotia."

There has never been a case in Nova Scotia where a person incorrectly imprisoned has applied for compensation.

The attorney general said his department will have to examine precedents in other jurisdictions, both in Canada and the United States, to see how the question of such compensation has been handled there.

He said another question that will arise is who

should be responsible to pay compensation, Ottawa or the province.

Mr. How said that Ottawa has a degree of responsibility because of its jurisdiction in areas concerning native people — Mr. Marshall is a Micmac Indian.

The province on the other hand has the prime responsibility for the administration of justice.

Mr. How also said his department will now consider whether criminal charges or other action should be taken respecting any individual or group of individuals who may have been involved in the death of Sandy Seale, for which Mr. Marshall was originally convicted 11 years ago.

The attorney general said that during the new trial before the provincial Supreme Court there was new evidence given that indicated another person was responsible for Mr. Seale's death.

In handing down its decision, the Supreme Court suggested that Mr. Marshall may have contributed to his own problems by not being truthful during the first trial.

Mr. How said that matter could also come into play when the issue of compensation is considered. "If you are partially the author of your own misfortune, that is a factor."

NATIONAL SECURITY

STATEMENT ON APPLICATION OF OFFICIAL SECRETS ACT

Hon. Ron Basford (Minister of Justice): Mr. Speaker, during the past several weeks, considerable attention has been given in the House and in the country to the conduct of the hon. member for Leeds (Mr. Cossitt) involving highly sensitive national security information. This House is also aware of an article published in the *Toronto Sun* on March 7, 1978, which made detailed and explicit references to a secret document containing national security information. While the two events may appear to have been related, I wish to indicate at the outset that I have not been made aware of any information that would relate the hon. member for Leeds to the article which appeared in the *Toronto Sun*.

In each of these instances, it is clear that certain documents and information of the most sensitive nature have been unlawfully released by, or obtained from, someone authorized to have them. Unfortunately, the person or persons responsible for this unlawful release of information have not been identified. The investigation into the circumstances of the release of this information will continue to be vigorously pursued and appropriate action will be taken when possible.

In some circles, the public servant who leaks sensitive information has some approval and "glamour". In my view, they have none. Such actions are contemptible and cowardly.

If a person in the service of this country is so dissatisfied, as is that person's fundamental right, with the conduct of public business by a duly elected government, their remedy is not in skulking about delivering brown envelopes and thereby discrediting their associates who serve Canada with devotion and integrity. Their remedy is to resign and endeavour, through our free institutions, to influence public affairs and public opinion. That, Mr. Speaker, in my view, is the lawful, proper and courageous way.

Because of the importance of the issues involved in these matters, I think that this House and the people of Canada are entitled at the first opportunity to know the decisions that I have reached on whether prosecutions should be instituted under the provisions of the Official Secrets Act against the hon. member for Leeds or against others in connection with the publication of the article in the *Toronto Sun*.

The privilege of free speech in this chamber and the freedom of the press are matters which are fundamental to our democratic system. Decisions on issues which tend to draw these fundamental principles into conflict with the protection of our national security interests must be taken with great care. What may be seen by some as a matter to be decided with speed has therefore been seen by me as a matter that demanded decision with careful thought and consideration.

What I have had to face, and resolve to my satisfaction, is whether and under what circumstances to authorize prosecutions under the Official Secrets Act. I have been guided by those parliamentary, constitutional, and legal principles which should be taken into account by the Attorney General in the

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discharge of this particular responsibility. Mr. Speaker, it might be useful to set some of those out.

In arriving at these I have been guided by recognized authorities such as Lord Shawcross, Edwards, Erskine, May and Bourinot, and more recently and very helpfully, my valuable discussions with Commonwealth attorneys general in Winnipeg last summer on the office of attorney general, and more particularly my personal conversations at that time with the Attorney General of England and Wales and the Lord Chancellor.

I am aware that, since the enactment of the Official Secrets Act, this would appear to have been the first occasion in Canada where consideration has to be given to the provisions of the Official Secrets Act and the right of a member of the House to freely express his views in the House in the course of carrying on his parliamentary business.

The first principle, in my view, is that there must be excluded any consideration based upon narrow, partisan views, or based upon the political consequences to me or to others.

In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by parliament itself. That is not to say that the Attorney General is not accountable to parliament for his decisions, which he obviously is.

Clearly, I am entitled to seek and obtain information from others, including my colleague, the Solicitor General (Mr. Blais), and the Commissioner of the Royal Canadian Mounted Police on the security implications of recent disclosures. This I have done.

In my view, the special position of the Attorney General in this regard is clearly entrenched in our parliamentary practice. Based on the authorities and on my own experience as a member of the government for ten years, which has included my three immediate predecessors, this special position has been diligently protected in theory and in practice.

Mr. Speaker, the second principle is that every citizen is subject to the law. One of the pillars of our system of government, dating back three centuries, is that neither the King nor any other person, be he a member of this House, a member of the government, a member of the press, or someone possessed of title or position, is above the law. The law should apply to all, equally. He who breaks it must bear the consequences.

Third, with today's differing ideological viewpoints between different countries, it is essential for the preservation of our democratic way of life that there should be maintained a strong and vigorous security service. In spite of all that has been alleged and what is properly being examined by the McDonald Commission, we are being well served by a group of dedicated individuals.

• (1222)

The functioning of a security service by its very nature demands that most of its operations remain secret. Unlawful

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disclosure of the details of what is known about the operations of foreign intelligence agents in this country, or provision to others of information about the operations of our security service, is to destroy and render useless the work of this service.

Fourthly, in exercising a discretion as to whether or not to consent to a prosecution under the Official Secrets Act, the Attorney General should ensure that the widest possible public interests of Canada are taken into account; that, as a member of this House, he has responsibilities toward the rights, privileges, traditions and immunities so necessary for the proper functioning of parliament; and finally that each competing public interest is weighed and balanced against the others in as responsible a way as possible.

In the present situation, the hon. member for Leeds has made statements in the House which must clearly have been based upon highly classified national security information. In my judgment, the hon. member's use of the secret information he was not entitled to have was contrary to the national interest. However, by law, his statements cannot constitute the foundation for a prosecution under the Official Secrets Act since it is well established that no charge in a court can be based on any statement made by an hon. member in this House.

The hon. member for Leeds did, however, make additional statements. In my view, these statements did not add substantially to what he had already said in the House. There is some doubt as to the extent to which a court would view these statements as being protected by any parliamentary privilege or immunity. The existence of this doubt guides me in my decision whether or not to provide my consent to a prosecution.

The obligation of the Attorney General in deciding whether or not to provide his consent under the Official Secrets Act calls into play the many factors I referred to earlier. In my view, an Attorney General should not provide such a consent unless the case is free from substantial doubt.

Having considered the evidence produced in the investigation to date, and having considered applicable legal and parliamentary principles, I have concluded that I should not consent to a prosecution against the hon. member for Leeds.

I must emphasize that in any case free from these elements of doubt, involving unlawful disclosure of information relating to national security by an hon. member, I would not hesitate to have a court of criminal jurisdiction pass upon the issue.

This House has established a committee to examine the privileges and immunities of members of parliament, including the application of the Official Secrets Act. That examination is necessary and, in my view, urgent. It is essential to protect the position of members of parliament to continue to be able to speak freely and candidly in carrying out the responsibilities that we bear on behalf of our constituents and the country at large without any harassment.

I look forward to the report of the special committee which I hope will outline the principles that should govern a member of this House when dealing with security or other highly

[Mr. Basford.]

sensitive matters and which will, I hope, strike a balance between the imperative public interest that the national security and integrity of the state ought not to be imperilled and the equally imperative public interest that members of this House should enjoy a freedom of speech commensurate with the necessity of fulfilling our obligations. It is historic and preferable that this House, and not the courts, settle these issues.

Mr. Speaker, with the highest of immunities goes the highest of responsibilities. I would urge all hon. members, prior to asking a question, or disclosing sensitive information of any kind, to take reasonable steps to bring the matter to the attention of the responsible minister of the Commissioner of the RCMP so that the member may be fully apprised of the possible seriousness of the matter and so that measures in proper cases might be taken to protect the information from public disclosure with its attendant risk of doing serious damage to our national security. To be fair, I want to add quickly that I am advised that there are members of the House and members of the press gallery and the public who do this.

I would further commend to the attention of hon. members what was said by the 1939 United Kingdom Select Committee on the Official Secrets Act and Privileges of Members, relating to the Duncan Sandys case, and I quote:

Your committee are of opinion that the soliciting or receipt of information is not a proceeding in parliament, and that neither the privilege of freedom of speech nor any of the cognate privileges would afford a defence of a member of parliament charged with soliciting, inciting or endeavouring to persuade a person holding office under the Crown, to disclose information which such person was not authorized to disclose or with receiving information knowing, or having reasonable grounds to believe, that the information was communicated to him in contravention of the Official Secrets Act.

With respect to the publication of the article in the *Toronto Sun*, parliament has not extended to any other person or body, the rights, privileges or immunities that are accorded by law to parliament and its members.

That is not to say that the press is not in a somewhat special position in our society, for without full and free dissemination of information through an independent and responsible press, a free society cannot continue to exist. That freedom is exercised under and pursuant to the rule of law. In that respect, members of the press are in no different a position from anyone else. I am confident that the courts are the proper forum for dealing with and defining the rights and responsibilities of the press.

Because of this special position of the press and lest any step be misconstrued as an attack on the essential freedom of the press, it is important that the process of the criminal law be invoked only after most careful and studied consideration.

It is with such consideration that I have examined the available evidence, including the extent of the information that was published, the present state of the law, the various competing public interests, and all other relevant factors in consenting, as I have done, to a prosecution under the Official Secrets Act in connection with the publication of the article in the *Toronto Sun*.

In arriving at these decisions, I have sought the opinion of the officers of the Department of Justice, and they concur in my decisions.

May I just add that because of the fact that an information was being sworn and laid, I felt it was appropriate that those people to whom it was being directed should concurrently know what I was saying before others. Therefore, I felt I should not and I did not provide to opposition House leaders or spokesmen a copy of my statement. That is not my usual practice, but I felt it was required in these circumstances. I trust they will appreciate that.

Some hon. Members: Hear, hear!

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QUESTIONS ON THE ORDER PAPER

[Translation]

Mr. Yvon Pinard (Parliamentary Secretary to President of Privy Council): Mr. Speaker, the following questions will be answered today: Nos. 503, 504, 505, 506, 507, 527, 685, 697, 704, 881, 929, 1,027, 1,152, 1,206 and 1,209.

I ask, Mr. Speaker, that the remaining questions be allowed to stand.

[Text]

RESEARCH—INDUSTRIAL SECTOR OF THE ECONOMY

Question No. 503—**Mr. Howie:**

1. From January 1 to November 1, 1977, what amount was spent by the Ministry of State for Science and Technology or its supporting agencies or councils for research in the industrial sector of the economy?

2. How many research projects (a) were started (b) were concluded (c) are still ongoing?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Technology): In so far as the Ministry of State for Science and Technology is concerned: The policy of the Ministry of State for Science and Technology is to formulate and develop policies in relation to the activities of the Government of Canada that affect the development and application of science and technology. The objective is to assure the optimum use of science and technology in support of national objectives. The Ministry has no laboratories and does not award grants-in-aid of research, scholarships or fellowships.

RESEARCH AT UNIVERSITY LEVEL

Question No. 504—**Mr. Howie:**

1. From January 1 to November 1, 1977, what amount was spent by the Ministry of State for Science and Technology or its supporting councils or agencies for research at the university level?

2. How many research projects (a) were started (b) were concluded (c) are still ongoing?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Tech-

Order Paper Questions

nology): In so far as the Ministry of State and Technology is concerned: The policy of the Ministry of State for Science and Technology is to formulate and develop policies in relation to the activities of the Government of Canada that affect the development and application of science and technology. The objective is to assure the optimum use of science and technology in support of national objectives. The Ministry has no laboratories and does not award grants-in-aid of research, scholarships or fellowships.

MONEY AVAILABLE FOR RESEARCH IN TRANSPORTATION

Question No. 505—**Mr. Howie:**

Since January 1, 1977, what amount has the Ministry of State for Science and Technology or its supporting agencies or councils made available to industry and/or universities for research work in the transportation field?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Technology): In so far as the Ministry of State for Science and Technology is concerned: The policy of the Ministry of State for Science and Technology is to formulate and develop policies in relation to the activities of the Government of Canada that affect the development and application of science and technology. The objective is to assure the optimum use of science and technology in support of national objectives. The Ministry has no laboratories and does not award grants-in-aid of research, scholarships or fellowships.

MONEY AVAILABLE FOR RESEARCH ON SOLAR ENERGY

Question No. 506—**Mr. Howie:**

Since January 1, 1977, what amount has the Ministry of State for Science and Technology or its supporting agencies or councils made available to industry and/or universities for research work on solar energy?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Technology): In so far as the Ministry of State for Science and Technology is concerned: The policy of the Ministry of State for Science and Technology is to formulate and develop policies in relation to the activities of the Government of Canada that affect the development and application of science and technology. The objective is to assure the optimum use of science and technology in support of national objectives. The Ministry has no laboratories and does not award grants-in-aid of research, scholarships or fellowships.

MONEY AVAILABLE FOR RESEARCH IN AEROSPACE FIELD

Question No. 507—**Mr. Howie:**

Since January 1, 1977, what amount has the Ministry of State for Science and Technology or its supporting agencies or councils made available to industry and/or universities for research work in the aerospace field?

Mr. Frank Maine (Parliamentary Secretary to Minister of Public Works and Minister of State for Science and Technology): In so far as the Ministry of State for Science and Technology is concerned: The policy of the Ministry of State